Petition

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81-173

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE WASHINGTON POST COMPANY,
Petitioner,

v.

CHARLES G. REBOZO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a newspaper can be found to have acted with "actual malice" in reporting sworn testimony of a professional insurance investigator, simply because of an alleged failure to review the words of that testimony with the investigator prior to publication.

2. Whether the record in this case contains any evidence upon which a finding of "actual malice" may constitutionally be based.

Rule 28.1 Listing

The following are subsidiaries of petitioner The Washington Post Company: Newsweek, Inc. (wholly owned subsidiary); Newsweek Services, Inc. (wholly owned second-level subsidiary); Post-Newsweek Stations, Inc. (wholly owned subsidiary); Post-Newsweek Stations, Florida, Inc. (wholly owned second-level subsidiary); Post-Newsweek Stations, Connecticut, Inc. (wholly owned second-level subsidiary); Post-Newsweek Stations, Michigan, Inc. (wholly owned second-level subsidiary); Top Market Television, Inc. (wholly owned second-level subsidiary); Bowater Mersey Company Ltd. (49% ownership); Robinson Terminal Warehouse Corp. (85% ownership); Los Angeles Times-Washington Post News Service (50% ownership); Postrib Corporation (50% ownership); International Herald Tribune, S.A. (30% ownership); Trenton Times Corporation (wholly owned subsidiary); The Daily Herald Company (wholly owned subsidiary); Newsprint, Inc. (wholly owned subsidiary); and Publishers' Phototype, Inc. (24% ownership).

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Petitioner, The Washington Post Company ("the Post"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, which reversed the entry of summary judgment in the Post's favor in this libel action brought by the respondent, Charles G. Rebozo.

OPINION BELOW

The opinion of the court of appeals, reported at 637 F.2d 375 (5th Cir. 1981), is printed in the Appendix to this Petition. A. 1a-15a.

JURISDICTION

The court of appeals filed its opinion and entered its judgment on February 19, 1981. A timely petition for rehearing was denied, without opinion, on April 29, 1981.

A copy of the Order denying the petition for rehearing is printed in the Appendix to this Petition. A. 25a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

STATEMENT OF THE CASE

A. Proceedings Below

Charles G. Rebozo brought this diversity action for libel on the basis of an article published in the Post on October 25, 1973. The article, entitled "Bebe Rebozo Said to Cash Stolen Stock," concerned a stock transaction that was then the subject of a suit for conversion brought by E. F. Hutton & Company against the Key Biscayne Bank, of which Rebozo was the President. The lead sentence of the Post article reported that Rebozo had "cashed $91,500 in stolen stocks in 1968 after he was told by an insurance investigator it was stolen, the investigator's sworn statement and other records in a Miami court file indicate." The second sentence of the article stated that Rebozo, through his lawyer, "flatly denies" that the investigator told him that the stock was stolen. The article is reprinted in its entirety in the Appendix to this Petition. A. 26a-41a.

In the district court, Rebozo claimed that the lead sentence of the article was false in two respects: (1) while Rebozo did not dispute that the investigator testified in a deposition that he told Rebozo that the stock was stolen, Rebozo insisted that the investigator's testimony was, in that respect, false; and (2) Rebozo con-

tended that his bank, not he, cashed the stock. Rebozo alleged that the Post published its article with knowledge that it was false in these respects, or with reckless disregard for the truth.

After plaintiff had the opportunity thoroughly to examine the reporter who wrote the Post article, his editor, and other Post employees who may have had responsibility for the content of the article, the Post filed a motion for summary judgment. The district court granted the motion after hearing oral argument for three hours. It held that Rebozo is a public figure under the standards announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and that "there is no genuine issue of material fact with respect to the existence of 'actual malice' under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny." A. 17a. Noting that "the plaintiff is entitled to the benefit of the strongest possible construction of all of the evidence,"[1] the court nevertheless concluded: "The record in this case contains no evidence from which a determination could be made that the article at issue was published with 'actual malice.'" A. 17a.

B. Statement of Facts

The court of appeals agreed that Rebozo is a public figure, but reversed the entry of summary judgment in the Post's favor. It held that there is a genuine issue of fact "on the details of investigator Riley's conversation with Rebozo, and reporter Kessler's review of it." A. 14a. It held further that there is a genuine issue of material fact as to "whether The Key Biscayne Bank or Rebozo himself cashed the stock." A. 15a.

The district court deemed all of the facts pertaining to the preparation of the Post article to have been ad-

[1] Transcript, Sept. 18, 1978 (R. Vol. 5), at 68.

mitted by Rebozo. A. 16a. Those facts, briefly, are as follows.

The article at issue was researched and written by Ronald Kessler, who spent two days reading the entire court file in the conversion case between E. F. Hutton and the Key Biscayne Bank. Kessler made copies of some of the documents and took notes on others. Among the documents Kessler studied and copied was the deposition of George H. Riley, Jr., an insurance investigator, A. 58a-67a, who testified to a meeting he had with Rebozo on October 22, 1968. Riley's testimony was the only testimony in the case pertaining to that meeting. A. 47a.

Riley testified in his deposition that he was asked in mid-October 1968 "to contact Key Biscayne Bank to determine if stock which had been stolen from [E. F. Hutton's] vault was pledged as collateral for a loan at The Key Biscayne Bank." A. 61a. Riley further testified that on October 12 or 13 he drove to the Key Biscayne Bank and informed a loan officer named Stearns that he "represented the bonding company for E. F. Hutton & Co.," and that he "was there to investigate some stolen stock certificates." *Ibid.* Stearns indicated that Rebozo was the only party who could assist him. After several unsuccessful attempts to meet with Mr. Rebozo, Riley finally met with him on October 22, 1968. A. 62a. Under questioning by Rebozo's counsel, the same counsel representing him in this case, Riley then testified as follows:

"Q. Did you tell Mr. Rebozo at that time that the stock had been stolen or was missing from E. F. Hutton & Co.?
A. Yes, sir.
Q. Can you recall exactly what you told him?
A. As I previously stated, I advised Mr. Rebozo that I was investigating the theft of nine 100-

share certificates from the vaults of E. F. Hutton & Co. in New York.

Q. Did you advise him of the numbers of the certificates that you were investigating?

A. Yes. And the numbers corresponded to the numbers he gave me [of stock certificates received by the bank as collateral for a loan]." A. 64a.

It was on the basis of this testimony, and other records placing the sale of 300 shares of the IBM stock three weeks later on November 13, 1968, that Kessler wrote the story's lead sentence.

After Kessler had read the entire court file, he called Riley to get any additional comments Riley might wish to make on his visit with Rebozo. A. 48a, 53a-56a. He attempted to discuss the IBM transaction and, specifically, Riley's testimony, with Rebozo, but Rebozo declined to talk to him. A. 49a. Unable to discuss Riley's testimony with Rebozo, the only other participant at the October 22 meeting with Riley, Kessler called Rebozo's attorney, Alan G. Greer, to get his comments. Greer told Kessler that Rebozo met with Riley but "flatly denies" that Riley told him the stock was stolen. *Ibid.* In a subsequent letter threatening legal action should the Post proceed with its proposed story, Mr. Greer stated:

> "Mr. Riley in his deposition does make the allegation that he told the Bank and Mr. Rebozo, in a meeting with only he and Mr. Rebozo present, that the stock was stolen. Mr. Rebozo flatly denies having been given such information." A. 43a.

After Kessler read Greer's letter, he checked the information contained in the story once again by reviewing his notes and the court documents in his possession.[2]

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[2] Kessler also discussed the IBM stock transaction on several occasions with the Executive Vice President of E. F. Hutton who had testified in the conversion suit, as well as the attorneys and the

Prior to approving the article for publication, Kessler's editor, Harry Rosenfeld, reviewed its contents with him and discussed with him the sources of the information contained in the article. Rosenfeld read Riley's deposition and discussed with Kessler his attempts to contact Rebozo, his telephone conversation with Mr. Greer, and the letter from Mr. Greer. Rosenfeld satisfied himself that the information contained in the article was fully supported and fairly presented. A. 50a-51a. The article was then published, with Riley's testimony described in the lead sentence and the denial of Rebozo's counsel reported in the second sentence.

REASONS WHY THE WRIT SHOULD BE GRANTED

Seventeen years after this Court's landmark decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), it would seem to be beyond doubt that a newspaper is entitled to the protection of the First Amendment when it reports sworn testimony concerning a public figure—particularly when the sworn testimony is of a professional insurance investigator recounting his own statements to the public figure concerning the subject of his investigation. The court of appeals' decision that such conduct in this case raises a jury issue of actual malice conflicts with numerous decisions of this Court, and is without the slightest support in the record. The grant of summary judgment was particularly appropriate here because no questions of the state of mind of the newspaper reporter are at issue in the case.

In the First Amendment area, this Court has emphasized that its "duty is not limited to the elaboration of constitutional principles; we must also in proper cases

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judge in the case. He discussed applicable banking regulations and practices with experts in the banking and securities industries, and he discussed the legal implications of Riley's testimony with legal experts. A. 48a-49a.

review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co. v. Sullivan, supra*, 376 U.S. at 285. Accordingly, in public figure libel cases it has "frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff." *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971).[3] There is no such evidence in this case, and the court of appeals' decision effectively eviscerates the protections of the actual malice standard, if a jury trial may be ordered despite the careful investigation petitioner conducted before publishing. This Court should grant certiorari here because the court below has significantly departed from well-established constitutional principles and subjected a newspaper to the expense, burden, and chilling effect of a libel trial in a case where there is simply no evidence of actual malice sufficient to constitute a genuine issue of material fact.

1. The court of appeals' reliance upon an alleged failure to review sworn testimony with the witness conflicts with this Court's decisions.

The court of appeals held that there is a "genuine issue of material fact on the details of investigator Riley's conversation with Rebozo, and reporter Kessler's review of it." A. 14a. As explained below, the sole factual allegation cited by the court to support this conclusion is that in a telephone conversation with Riley, the reporter "failed to review with Riley the words in Riley's earlier deposition" that formed the basis for the article's lead sentence. *Ibid.* The court's apparent reliance upon this purported failure conflicts with the repeated decisions by this Court that evidence of negligence, or failure to in-

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[3] Citing *New York Times Co. v. Sullivan, supra*, 376 U.S. at 284-85; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 83 (1967); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970).

vestigate, does not create a jury issue of actual malice under *New York Times. See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967); *St. Amant v. Thompson*, 390 U.S. 727, 731, 732 (1968); *New York Times Co. v. Sullivan, supra.*

It is beyond genuine dispute that the investigator, Riley, did testify in his deposition that on October 22, 1968 he told Rebozo that certain IBM stock later sold by Rebozo's bank had been stolen from E. F. Hutton. In his pre-publication letter, Rebozo's counsel—the same counsel representing him in this case—conceded that Riley so testified. Counsel stated:

> "Mr. Riley in his deposition does make the allegation that he told the bank and Mr. Rebozo . . . that the stock was *stolen*." A. 43a (emphasis added).[4]

In concluding that a genuine issue of actual malice exists in this case, the court of appeals stated:

> "Despite Kessler's professed belief in the veracity of Riley's deposition testimony, Kessler's resolution of the obvious ambiguity whether Riley told Rebozo the stock was (a) missing, (b) stolen, or (c) missing

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[4] Understandably, counsel would not have made such a concession in a pre-publication letter threatening suit unless the concession was warranted, indeed mandated, by the transcript of Riley's deposition testimony. Riley testified that he "was asked to contact Key Biscayne Bank to determine if stock which had been *stolen* from our insured's vault was pledged as collateral for a loan at The Key Biscayne Bank." A. 61a (emphasis added). He also testified that when he first arrived at the bank he told Mr. Stearns, the loan officer, "that I was there to investigate some *stolen* stock certificates." *Ibid.* (emphasis added). And when asked by Rebozo's counsel—once again, the same counsel representing Rebozo in this case—"exactly" what he told Rebozo, Riley responded that he "advised Mr. Rebozo that I was investigating the *theft* of nine 100-share certificates from the vaults of E. F. Hutton & Co. in New York." A. 64a (emphasis added). Rebozo's counsel sought no further elaboration of that response.

> or stolen, in favor of the most potentially damaging alternative creates a jury question on whether the publication was indeed made without serious doubt as to its truthfulness." A. 14a-15a.

While at first blush this statement might be read as suggesting that Riley's testimony itself contained an ambiguity, it is clear that the court of appeals could have intended no such suggestion. As noted, Riley's testimony was clear, and the court of appeals was apparently interested in the reporter's "professed belief in the *veracity*" of Riley's unambiguous testimony. A. 14a (emphasis added). That, after all, was the sole thrust of Rebozo's counsel's pre-publication letter: conceding that Riley testified he told Rebozo the stock was stolen, counsel argued that Riley's testimony to that effect was false.[5] Thus, the only purported ambiguity or uncertainty in this case is not whether Riley in fact told Rebozo that the stock was stolen but whether Riley's sworn testimony to that effect was false.

The Post can be found to have acted with "actual malice" in reporting Riley's sworn testimony only if it did so despite "[a] high degree of awareness of [the testimony's] probable falsity." *Garrison v. Louisiana*,

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[5] See A. 42a-44a. Counsel did take a different position before the court of appeals, arguing that Riley's testimony was not that he told Rebozo the stock was "stolen," but that he told Rebozo it was "stolen or missing." As indicated at page 4, *supra*, however, the term "stolen or . . . missing" was used by Rebozo's counsel in his questioning of Riley; it was never used by Riley in his answers. Riley's answers were unambiguous, as conceded by Rebozo's counsel in his pre-publication letter. And even if Riley's testimony were ambiguous, the Post would be entitled to the protection of this Court's holding in *Time, Inc. v. Pape*, 401 U.S. 279 (1971)—that "[t]he deliberate choice of [a rational] interpretation [of an ambiguous document], though arguably reflecting a misconception, [is] not enough to create a jury issue of 'malice' under *New York Times*." 401 U.S. at 290. See pp. 14-17 *infra*.

379 U.S. 64, 74 (1964). The question at this stage of the proceeding is whether the record contains any evidence which, together with permissible inferences therefrom, could support such a finding of actual malice.

The court of appeals noted that "even though Kessler went to the trouble of calling Riley, he failed to review with Riley the words in Riley's earlier deposition." A. 14a. The court of appeals referred to Kessler's testimony that although he "specifically [told] Mr. Riley what his testimony was" during that telephone conversation, and "referred to [Riley's] testimony that he said . . . that the stock was stolen," he did not read Riley's testimony to him during the conversation. A. 56a, 55a. The only other evidence in the record the court of appeals cited was Kessler's negative response to this question: "Did you specifically ask [Riley] whether his statement in the deposition concerning his conversation with Mr. Rebozo was accurate?" Kessler explained that answer as follows:

> "It wasn't necessary to specifically ask that. By calling him and making it known to him that I intended to use his testimony in a story, and also trying to emphasize to him the significance of his testimony or the significance that I attached to it, I intended to bring out from him any additional comments that might be relevant." *Ibid.*[6]

If the court of appeals intended to suggest that actual malice can be shown by a failure to ask specifically whether sworn testimony is accurate, or by a failure to read sworn testimony back to a witness, the suggestion is in direct conflict with several of this Court's decisions. This Court has repeatedly held that evidence of negligence, or failure to investigate, does not create a jury issue of actual malice. Certainly the alleged investigative

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[6] The entire sequence of questions and answers of which these quoted items are a part is reprinted in the Appendix to this Petition. A. 53a-57a.

failures relied upon by the court of appeals are insufficient to create a jury issue of actual malice.

In *New York Times* itself, the newspaper could have identified and corrected the inaccuracies in the publication complained of by searching its own morgue file. The Court held that the Times' failure to do so was insufficient evidence of actual malice to support a jury verdict.

> "The mere presence of the stories [indicating the inaccuracies] in the files does not, of course, establish that the *Times* 'knew' the advertisement was false." 376 U.S. at 287.

This principle was reiterated in *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967). The newspaper there published an editorial accusing the plaintiff, a public official, of intimidating another public official by threats. Both the plaintiff and the other official testified that the plaintiff had made no threats. The publisher admitted that he had not investigated whether threats were made, and admitted he could come no closer to the truth than to say there was a "possibility" that threats were made. This Court, without even hearing argument, reversed the judgment for Hanks.

> "[I]t cannot be said on this record that any failure of petitioner to make a prior investigation constituted proof sufficient to present a jury question whether the statements were published with reckless disregard of whether they were false or not." *Id.* at 84-85.

In *St. Amant v. Thompson*, 390 U.S. 727 (1968), the plaintiff claimed that "actual malice" was shown by the defendant's failure to verify with anyone else the information obtained from a single source. The source's veracity was not established on the record, and there were other individuals in a position to know the facts. Even in those circumstances, this Court held that the

defendant's failure to contact those other individuals "fall[s] short of proving [the defendant's] reckless disregard for the accuracy of his statements." 390 U.S. at 730.

> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." 390 U.S. at 731.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974), this Court once again stressed that "mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth."

These cases make clear that any purported deficiencies in the Post's investigation in this case do not create a jury question of actual malice. Indeed, the Post's exhaustive efforts in this case stand in stark contrast to the investigative failures in *New York Times*, *Beckley Newspapers Corp.* and *St. Amant*, and far exceed what is required under the actual malice standard. Under this Court's decisions, the Post was free to publish its story without ever contacting Riley. It had Riley's unambiguous sworn testimony and the denial of Rebozo's counsel. Rebozo had refused to discuss the matter with the Post's reporter. Rebozo had not given any testimony about his visit with Riley to compare with Riley's testimony. And there were no participants in the October 22nd meeting other than Riley and Rebozo. Under these circumstances, the Post was surely entitled to republish Riley's sworn testimony together with the denial of Rebozo's counsel.

As the court of appeals noted, however, the Post took an additional step before publishing the story. It "went to the trouble of calling Riley." A. 14a. The Post re-

porter, Ron Kessler, described that conversation in his testimony as follows:

—Kessler called Riley "to get any further comments he might want to make in connection with the deposition, but more importantly, . . . to make sure he understood the significance of his testimony because in the deposition there was no reference to the fact that the extra three hundred shares of stock in question were sold by Mr. Rebozo after Mr. Riley says that he told Mr. Rebozo that the stock was stolen." A. 53a-54a.

—Kessler "specifically" told Mr. Riley what Riley's testimony was, A. 56a, and "referred to his testimony that he said . . . that the stock was stolen." A. 55a.

—Kessler "specifically pointed out to [Riley] what that would mean: That Mr. Riley made this statement before Mr. Rebozo subsequently cashed that same stock." A. 55a.

—Kessler told Riley that he intended to use Riley's testimony in a story. A. 48a.

—Kessler asked Riley whether Riley understood the significance of his testimony, and Riley gave an indication that he did. A. 48a, 53a-54a.

—In response to further questioning Riley indicated that to his knowledge prosecutors were not aware of his testimony. A. 48a.

—Riley then informed Kessler that he did not want to discuss the case further because the case was in litigation. A. 48a, 57a.

—Kessler told Riley that if there was anything he wanted to add to his testimony he could give Kessler a call. A. 48a, 56a.

Rebozo did not present any testimony from Mr. Riley or any other evidence to controvert Kessler's account of

that conversation, and neither Rebozo nor the court of appeals referred to anything that was said in that conversation that might raise a question of actual malice.

Rather, the court of appeals apparently relied upon the facts that Kessler did not read Riley's testimony to him and did not ask "specifically" whether Riley's sworn testimony was accurate. These purported failures cannot, consistently with this Court's decisions, support a finding of actual malice. Failure to make the call could not have supported such a finding. And Kessler's undisputed account of his call to Riley not only contains nothing to support a finding of actual malice, it negates any conceivable inference of actual malice. Riley's responses to Kessler's inquiries plainly indicated that Riley, fully aware that his testimony was going to be reported, was content to let that testimony stand without amendment or additional explanation.

2. The court of appeals' decision conflicts with this Court's decision in *Time, Inc.* v. *Pape*.

It is possible that the court of appeals intended to suggest that other portions of the record in the underlying conversion case may have cast doubt on Riley's deposition testimony—in other words, that the record as a whole may have contained an "ambiguity"—and that Kessler's resolution of that ambiguity creates a jury issue of actual malice. If that was the court's intent, however, its decision is faulty on two grounds.

First, the court did not cite a shred of evidence in the underlying conversion case, or in the record in this case, that casts the slightest doubt on the truth of Riley's testimony or that creates any ambiguity as to what Riley in fact told Rebozo.[7] The omission cannot be viewed

[7] The court of appeals noted "in passing" that in an opinion in the underlying conversion case between E. F. Hutton and the Key Biscayne Bank, announced in October 1974, a court of appeals panel

as a mere oversight, for Rebozo has been unable at any stage of this proceeding to point to any such evidence. In fact, there is none.

"found that not until December 1968, nearly two months after the stock sale, did E. F. Hutton learn that the stock involved in this case was among those shares missing from its vault." A. 14a. As the court below apparently recognized, however, nothing in the 1974 opinion in the conversion case could itself be the basis for any inference of actual malice, because that opinion was not issued until a year after the Post article was published.

Nor, as the district court recognized in this case, Transcript, Sept. 18, 1976 (R. Vol. 5), at 41-42, can the court of appeals' 1974 decision in the underlying conversion case now give pause as to whether the complete record in that case that was available to the Post cast doubt on Riley's testimony. As Rebozo's counsel repeatedly emphasized at trial in the conversion case, "the only claim" in that case was that the bank converted the stock at the end of July 1968 when it took the IBM stock as collateral and had it transferred from street name to the borrower's name, and "everything . . . that went on after [that] has absolutely no bearing on this case." *Fidelity and Casualty Company of New York v. Key Biscayne Bank*, No. 72-2545 (5th Cir.), Record on Appeal (hereinafter "R."). The district court agreed, and the testimony and findings in that case were restricted to the state of the bank's knowledge some three months before Riley's visit to Rebozo. Thus, Riley's deposition was not even introduced into evidence at trial because it was irrelevant to the issue in that case. The only "finding" in that case was the district court's finding that the bank had no notice of E. F. Hutton's adverse claim to the stock "before it became a purchaser on or about July 31, 1968." Findings of Fact and Conclusions of Law, ¶ 23 (attached as Addendum to Brief of Appellant in the court of appeals).

To the extent that the court of appeals' 1974 opinion in the conversion case referred to what the bank learned *after* July 31 and *when* the bank learned it, its comments were irrelevant to the issue in the case and, more importantly, were based on a record that excluded evidence that would have been relevant to those questions—most notably, Riley's deposition. The passing comment the court made in its 1974 opinion in the conversion case, alluded to by the court in this case, was simply an interpretation of an audit report that, in view of the undisputed facts in this case, must be interpreted differently. In December 1968 E. F. Hutton's auditors finally determined the certificate numbers of *all* of the 5,000 shares of IBM stock that had been stolen from E. F. Hutton. But that fact

Second, even assuming that the record as a whole in the underlying conversion case contained an ambiguity, the court of appeals' conclusion that Kessler's "resolution of [that ambiguity] . . . in favor of the most potentially damaging alternative creates a jury question" of actual malice conflicts with this Court's holding in *Time, Inc. v. Pape*, 401 U.S. 279 (1971). In that case, this Court held squarely that the adoption of a rational interpretation of an ambiguity in a documentary source does not, as a matter of law, create a jury issue of actual malice.

In the *Pape* case, Time magazine had published a news story on the report of the United States Commission on Civil Rights. The Commission's report contained a recital of the allegations contained in a complaint against several Chicago police officers for violation of the federal Civil Rights Act. The Time article quoted at length from the Commission's summary of that complaint, without indicating in any way that the factual assertions were allegations in a private civil rights complaint rather than independent findings of the Commission. Time's witnesses, the author and researcher, testified in essence that they were aware of the omission of the word "allegation" or some equivalent from the Time article, but that the context of the Commission's report indicated to them that the Commission believed the incident to have occurred as described. The court of appeals concluded that the omission of the word "allegation" or some equivalent from the Time article was a "falsification" of the Commission's report, and that since the omission was admittedly conscious and deliberate it could itself support an inference of actual malice. This Court disagreed. It held:

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does not alter the *undisputed* facts in this case that E. F. Hutton became aware of the theft in September, that it had traced 900 of the shares to the Key Biscayne Bank "early in October," and that Riley inquired about those 900 shares in his October 22nd meeting with Rebozo. A. 47a; R. 731-32.

> "Time's omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New York Times*." 401 U.S. at 290.

That holding is fully applicable to this case. If, despite the unambiguous nature of Riley's testimony, the lengthy record in the underlying conversion case is deemed to be ambiguous taken in its entirety, the Post's choice of one rational interpretation of that ambiguity surely is not enough to create a jury issue of actual malice.

3. There is no record evidence that could support an inference of actual malice.

This Court's independent review of " 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the [libel] plaintiff," *Time, Inc. v. Pape*, *supra*, 401 U.S. at 284, while generally performed after a verdict, serves equally important functions at the summary judgment stage. For it is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause self-censorship. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958). If the record, construed most favorably to the plaintiff, does not contain any evidence that could constitutionally support an inference of actual malice, then subjecting the defendant to the burdens of a trial is both wasteful and offensive to First Amendment values.

As already noted, there is no evidence that could support a jury verdict that the Post acted with actual malice in reporting Riley's sworn testimony that he told Rebozo the stock was stolen. Nor is there any evidence that could support a jury verdict of actual malice in the Post's re-

porting that Rebozo cashed the stock. The court of appeals' conclusion that there exists a genuine issue of fact in this regard is based upon a fundamental mischaracterization of the issue in this case. In framing the issue, the court of appeals erroneously stated that "the parties differ on whether the stock was sold by the Key Biscayne Bank itself, or on Rebozo's personal account." A. 3a. The parties do not differ on that question. The article does not suggest, and it is not the Post's position, that the stock was sold "on Rebozo's personal account." As the district court noted,[8] the fourth sentence of the article and the article as a whole make clear that the entire stock transaction was a bank transaction, not a personal transaction of Mr. Rebozo.[9]

The only dispute between the parties is whether the Post was protected in reporting that it was Rebozo who cashed the stock on behalf of the bank, rather than some other bank official. The court of appeals did not even address that question. If it had, it could only have concluded that Rebozo's own account of his role in the transaction establishes, as a matter of law, that it was accurate to report that he cashed the stock; his admissions certainly preclude any inference of actual malice on the Post's part.[10]

---

[8] Transcript, Sept. 18, 1978 (R. Vol. 5), at 48.

[9] One of Kessler's memoranda contains a mistaken reference to Rebozo's "personal account," but the issues in the case are defined by the story, which contains no such reference and which makes clear that the transaction was a bank transaction.

[10] Rebozo testified in the underlying conversion case that he received the telephone call proposing the loan, he met the borrower at the bank on the date the loan was made, he personally examined the stock certificates when the loan was made, he participated in the investigation of the stock certificates, he forwarded the certificates in E. F. Hutton's street name to IBM for transfer to the borrower's name, he decided to call the loan, and he communicated the decision to call the loan to the borrower. R. 692, 701-06, 714-17,

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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720-27, 735-39. In addition, Rebozo was the bank official who met with Riley, the insurance investigator, to discuss the stock, R. 740-47, and he was the bank official who wrote to the borrower immediately thereafter asking him whether he wanted to have the stock sold. R. 748-49. Finally, the slip confirming the sale, the receipt for the securities, and the proceeds of the sale were all marked by the broker to Rebozo's attention. R. 750-51, 758-61.

APPENDIX

APPENDIX

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[OPINION OF THE COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-3403

CHARLES G. REBOZO,
Plaintiff-Appellant-Cross Appellee,

v.

THE WASHINGTON POST COMPANY,
Defendant-Appellee-Cross Appellant.

Feb. 19, 1981

Appeal from the United States District Court
for the Southern District of Florida

Before WISDOM, RONEY and HATCHETT, Circuit Judges.

RONEY, Circuit Judge:

This is an appeal from a summary judgment entered for the defendant newspaper in a defamation suit. The district court found that plaintiff was a public figure and that no genuine issue of material fact existed as to whether defendant acted with actual malice. We affirm the court's finding that plaintiff is a public figure. We reverse, however, as to the decision that there was no genuine issue of material fact on the question of whether defendant acted with actual malice in publishing the newspaper article that forms the basis of this suit, and remand for further proceedings.

I. *FACTS*

Because the case was decided on defendant's motion for summary judgment, we must construe the record

most favorably to plaintiff. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 162 n.5, 99 S.Ct. 2701, 2705 n.5, 61 L.Ed.2d 450 (1979); *Time, Inc. v. Ragano*, 427 F.2d 219, 221 (5th Cir. 1970).

In June 1973 Ronald Kessler, a reporter with substantial financial and reporting experience for defendant's newspaper, *The Washington Post*, was assigned by his editor to prepare a series of articles on the finances of then-President Richard M. Nixon. As part of his preparation Kessler became interested in plaintiff Charles G. Rebozo because of his relationship with the former President. Rebozo had been, and continues to be, a close friend and financial adviser of the former President, and serves as chairman of the board and president of the Key Biscayne Bank in Miami.

Newsday, a Long Island, New York, newspaper in 1971 had published a series of articles about Rebozo, one of which described a Miami lawsuit involving allegations that the Key Biscayne Bank had converted 900 shares of stock belonging to E.F. Hutton & Co. Some of the stock had apparently been pledged as collateral for a loan at the Key Biscayne Bank, and was later sold when the loan was called. During the course of his investigation, Kessler reviewed the file in the case, which by that time was pending in this Court on appeal, in order to determine whether it contained any subsequent unreported developments. *See Fidelity & Casualty Co. v. Key Biscayne Bank*, No. 70-619-Civ-JLK (S.D. Fla. Jan. 24, 1972) (order granting defendant's motion for directed verdict), *vacated and remanded*, 483 F.2d 438 (5th Cir. 1973), *dismissed* (S.D. Fla. 1973), *aff'd*, 501 F.2d 1322 (5th Cir. 1974).

Among other things Kessler studied the deposition of George H. Riley, Jr., who had been retained to investigate a claim filed by E.F. Hutton with its surety, the

Fidelity and Casualty Company of New York. In his deposition, Riley described a meeting he had with Rebozo in October 1968 as follows:

> Q Did you tell Mr. Rebozo at that time that the stock had been stolen or was missing from E.F. Hutton & Co.?
>
> A Yes, sir.
>
> Q Can you recall exactly what you told him?
>
> A As I previously stated, I advised Mr. Rebozo that I was investigating the theft of nine 100-share certificates from the vaults of E.F. Hutton & Co. in New York.
>
> Q Did you advise him of the number of the certificates that you were investigating?
>
> A Yes. And the numbers corresponded to the numbers he gave me.

It is undisputed that 300 shares of the stock were sold on November 13, 1968, although the parties differ on whether the stock was sold by the Key Biscayne Bank itself, or on Rebozo's personal account.

After Kessler read the court file in Miami and New Orleans, he called Riley on the telephone because, as Kessler described, "I wanted, somehow to get a feeling from him, at least as to whether he understood the possible significance of his testimony." Kessler recounted a portion of his telephone conversation with Riley as follows on deposition:

> Q Did you specifically ask him whether his statement in the deposition concerning his conversation with Mr. Rebozo was accurate?
>
> A No.
>
> Q Why not?
>
> A I attach great significance to testimony given under oath and most newspaper articles, of course, are based on statements that are not made under

oath. So, when a reporter obtains statements that are made under oath, it is certainly of more significance than otherwise.

Q It would have been significant, wouldn't it Mr. Kessler, if Mr. Riley told you he had made an error or a misstatement in his sworn testimony?

A Yes.

Q You didn't think it important to find out whether he would say whether he was right or wrong in that statement?

A No.

Q You didn't want to know what he wanted to say on that issue?

[Objection omitted]

Kessler also contacted Rebozo's attorney, who told him Rebozo "flatly denies" that Riley told Rebozo during their October 1968 meeting that the stock was stolen. The attorney followed up the conversation with a letter, repeating that Riley's testimony was false in that respect.

The question whether Rebozo personally, or the Bank, had cashed the stock was the subject of an October 6 internal memorandum from Kessler to his *Post* editor, Harry Rosenfeld, prompted by the telephone conversation between Kessler and Rebozo's attorney. A portion of that memorandum states:

> So who cashed the stock? Neither Rebozo nor other witnesses were asked this question in the depositions. There are no other legal papers in the court file to answer the question.
>
> But there are copies of the bills, receipts, and checks covering the sale transaction. As is clear from the attached, they all bear Rebozo's name.
>
> • • • •

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>
> But there are copies of the bills, receipts, and checks covering the sale transaction. As is clear from the attached, they all bear Rebozo's name.

* * * *

> The fact that Rebozo's name appears on them, and that the transactions were executed on his personal account, appear to me to be more than sufficient evidence for the purposes of an accurate and fair newspaper account of what appears in the court file that Rebozo technically and substantially cashed the check.

Kessler and Rosenfeld discussed the content of an article Kessler had prepared on the stock transaction, and reviewed the sources of the information contained in the article.

On October 25, 1973, *The Washington Post* published a front-page article containing the headline, "Bebe Rebozo Said to Cash Stolen Stock," accompanying a photograph of plaintiff, and the following four paragraphs:

> Charles G. (Bebe) Rebozo, President Nixon's close friend, cashed $91,500 in stolen stocks in 1968 after he was told by an insurance investigator it was stolen, the investigator's sworn statement and other records in a Miami court file indicate.
>
> A lawyer for Rebozo conceded the investigator visited Rebozo but said Rebozo "flatly denies" the investigator told him the stock was stolen.
>
> The $91,500 in securities represented 300 of the 900 shares of International Business Machines Corp. stock that federal prosecutors say was stolen by the Mafia in 1968 from the vaults of E. F. Hutton & Co., a New York stock brokerage firm.
>
> The stock came into Rebozo's possession when it was offered as collateral for a loan from Rebozo's bank, Key Biscayne Bank in Florida.

The story continued for a total of 126 paragraphs, with the balance of the article appearing on pages A14 and A15 of defendant's newspaper. The "main point" of the story, according to Kessler, was contained in the

"lead," or first paragraph. Farther along in paragraph number 99, the *Post* article quoted the passage from investigator Riley's deposition, in which Riley was questioned about whether the stock "had been stolen *or was missing*." (emphasis added).

Rebozo's complaint contends the article's lead sentence is false in two respects: (1) the investigator did not tell him the stocks were stolen; and (2) the stocks were cashed by the bank, not by him. The question of the article's falsity, however, is not an issue in this appeal.

II. *WAS REBOZO A PUBLIC FIGURE?*

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court held that a public official cannot recover damages for defamation relating to official conduct absent a showing of " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80, 84 S.Ct. at 725-26. Three years later the Court held in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), that the *New York Times* standard is applicable to "public figures" as well. *See also Associated Press v. Walker*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). The Court elucidated the applicability of *New York Times* to public figures, but refused to expand the protection afforded by that standard to actions brought by private persons, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-47, 94 S.Ct. 2997, 3009-10, 41 L.Ed.2d 789 (1974).

Application of the *New York Times* rule to public figures, the Court observed, is supported by two factors. First, public figures, because they "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally

enjoy," are less vulnerable to injury from defamatory statements. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 344, 94 S.Ct. at 3009; *see Wolston v. Reader's Digest Association, Inc.*, 443 U.S. at 164, 99 S.Ct. at 2706. A second consideration, and one that has been given greater weight by the Court, is that public figures, the news media may assume, "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345, 94 S.Ct. at 3009. The Court went on to describe two ways in which a person may become a public figure for first amendment purposes.

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

418 U.S. at 345, 94 S.Ct. at 3009. *See also Wolston v. Reader's Digest Association, Inc.*, 443 U.S. at 164, 99 S.Ct. at 2706; *Time, Inc. v. Firestone*, 424 U.S. 448, 453, 96 S.Ct. 958, 964, 47 L.Ed.2d 154 (1976). Thus, under the analysis suggested in *Gertz v. Robert Welch, Inc.*, two types of public figures emerge: Those who are public figures for all purposes, and those who are public figures for a limited range of issues.

The district court held as a matter of law that plaintiff "had achieved such pervasive fame and notoriety as of . . . the date of publication . . . that he had become a public figure 'for all purposes and in all context'" (*quoting Gertz v. Robert Welch, Inc.*, 418 U.S. at 351, 94 S.Ct. at 3012). Our review of this conclusion requires that we consider, first, whether plaintiff's purported

status as a public figure is appropriate for decision on summary judgment and, second, whether the evidence considered in a light most favorable to plaintiff, shows him to be a public figure for the purposes of this litigation.

The Supreme Court has on numerous occasions, treated the public figure and public official questions as matters of law, for the trial court to decide. *See, e.g., Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789; *Rosenblatt v. Baer*, 383 U.S. 75, 88, 86 S.Ct. 669, 677, 15 L.Ed.2d 597 (1966). This Court has observed in this same context that "where undisputed facts admit to but one conclusion, then, on motion for summary judgment, the court properly decides the issue." *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 862 (5th Cir. 1978). Even if summary judgment were improper because of issues of fact that could only be resolved after evidentiary hearing, the trial court, not a jury, must determine whether the evidence showed that plaintiff was a public figure. *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980). In the absence of conflicting inferences to be drawn from the record in this case, we conclude the district court was justified in considering the public figure question on summary judgment.

The record in this case contains sufficient undisputed facts to show that Rebozo, at the time of publication, was a public figure. As is well known, Rebozo was President Nixon's closest friend while Nixon was in the White House. While this in and of itself has considerable significance, we need not decide whether a confidential relationship with the President of the United States automatically converts one into a public figure, since the record indicates Rebozo had in other ways voluntarily exposed himself to the risk of close public scrutiny.

Rebozo played a substantial role in the former President's financial affairs, acting as the President's agent in the management of the President's bank accounts at the Key Biscayne Bank, and in the purchase of two homes. Plaintiff also played a role in the purchase and sale of other investments for the former President. In addition Rebozo's relationship with the President was not confined to counseling on business and financial matters. Rebozo freely admitted he offered his opinions to President Nixon on various matters, and transmitted to the former President the views of other important people on certain policy matters. The two discussed the Watergate situation when it began to arise in late 1973.

More significantly for purposes of this case, Rebozo played an active role in the President's 1972 re-election campaign, helping to arrange major contributions for the President's political benefit. The Senate Select Committee on Presidential Campaign Activities, the so-called Watergate Committee, investigated closely Rebozo's role in the 1972 campaign and his involvement in President Nixon's finances, eventually publishing five volumes of data describing Rebozo's connections with the former President and his campaign.

Press coverage of Rebozo has focused both upon his relationship to the President and upon his own business and personal affairs, although the public's interest in his activities has certainly been enhanced by his connections with the former President. The record indicates that during the six months prior to October 25, 1973, the date of the *Washington Post* article, *The New York Times* published 48 articles mentioning Rebozo, while *The Miami Herald* published 76. Prominent stories in 1968 and 1971, in *The New York Times* and *Newsday*, described Rebozo's business and financial dealings in some detail. Rebozo himself recognized, "[W]hen you are traveling in the circles that I have traveled in, there are press people all over the place."

In view of the foregoing, Rebozo, met, as a matter of law, both *Gertz v. Robert Welch, Inc.*, public figure considerations. First, he "enjoy[ed] significantly greater access to the channels of effective communication and hence [had] a more realistic opportunity to counteract false statements than private individuals enjoy." 418 U.S. at 344, 94 S.Ct. at 3009. There is evidence in the record that following publication of the *Post* article, both *The Miami Herald* and a major television network published Rebozo's response.

Second, on the basis of his voluntary activities, "the communications media [were] entitled to act on the assumption" plaintiff "had voluntarily exposed [himself]" to the risk of close public scrutiny. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345, 94 S.Ct. 3009. Rebozo's activities—including his association with President Nixon, taking part in his financial affairs, and involvement with the re-election effort—made him a prime subject of public comment.

Accordingly, we affirm the district court's conclusion that for the purposes of this litigation plaintiff Rebozo was a public figure at the time this article was published.

III. *WAS THE MALICE QUESTION APPROPRIATE FOR RESOLUTION ON SUMMARY JUDGMENT?*

The district court, having decided that plaintiff was a public figure, applied the correct standard of liability but held there was no genuine issue of material fact on the question of "actual malice," as defined by *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26. Because we conclude that the facts in this case, taken in a light most favorable to Rebozo, raised such an issue of fact, we reverse the summary judgment entered for defendant.

In *New York Times Co. v. Sullivan*, the Supreme Court held the First Amendment precludes recovery by

a public official for defamation unless the plaintiff can prove the statement was made with actual malice. A person has acted with actual malice when a statement is made with knowledge that it was false, *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26, or with a high degree of awareness of the statement's probable falsity, *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964), or with reckless disregard of whether the statement was false or not, *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26. *See Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980); *Long v. Arcell*, 618 F.2d 1145, 1147 (5th Cir. 1980). The Supreme Court has further defined the phrase "reckless disregard":

> There must be sufficient evidence to permit the conclusion that the defendant in fact entertained *serious doubts* as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968) (emphasis added). *See* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1370-75 (1975). Recklessness cannot be inferred, however, from the mere combination of falsehood and the defendant's general hostility toward the plaintiff, nor may reckless disregard be inferred from negligence. *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6, 10, 90 S.Ct. 1537, 1539, 26 L.Ed.2d 6 (1970); *St. Amant v. Thompson*, 390 U.S. at 731, 88 S.Ct. at 1325.

The parties argue at some length as to whether summary judgment is a "peculiarly appropriate vehicle for the disposition of libel suits governed by the actual malice standard of *New York Times*." Appellee's brief at 30.

In all candor, there is a certain amount of confusion in our cases on this question. Some of our cases have recognized that the plaintiff's standard of proof on the actual malice issue is higher than other issues and have thus concluded that actual malice is "an issue which lends itself to summary judgment." *E.g., Southard v. Forbes, Inc.*, 588 F.2d 140, 146 (5th Cir. 1979), *cert. denied*, 444 U.S. 832, 100 S.Ct. 62, 62 L.Ed.2d 41 (1980). Other cases have suggested that the need under the First Amendment to protect publishers from the chilling effect of a long and expensive trial justifies a presumption in favor of summary judgment. *See Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 864-65 (5th Cir. 1970); *Time, Inc. v. McLaney*, 406 F.2d 565, 566 (5th Cir. 1969). Other cases, however, have recognized that actual malice refers to the mental state of the defendant with respect to the truthfulness of the allegedly defamatory material and that "[p]roof of such a mental state must usually be inferred from circumstances difficult to develop on motion for summary judgment." *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir.), *cert. denied*, 404 U.S. 864, 92 S.Ct. 49, 30 L.Ed.2d 108 (1971). *See also Time, Inc. v. Ragano*, 427 F.2d 219 (5th Cir. 1970). Even those cases strongly urging summary judgment describe it as proper only where the record is "devoid of genuine issues of fact" on the actual malice question. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d at 865.

In view of this uncertainty, it is appropriate to examine closely the recent Supreme Court authority related to this inquiry. The subjective nature of the evidence a plaintiff must rely on was emphasized by the Supreme Court in *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), where it was held that "any direct or indirect evidence relevant to the state of mind of the defendant," *id.* at 165, 99 S.Ct. at 1643, could be used to support plaintiff's burden of showing

actual malice with convincing clarity. The implications of this holding with respect to summary judgment disposition were noted in a case decided that same term, *Hutchison v. Proxmire*, 443 U.S. 111, 120 n.9, 99 S.Ct. 2675, 2680 n.9, 61 L.Ed.2d 411 (1979).

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254 [84 S.Ct. 710, 11 L.Ed.2d 686] (1964), and does not readily lend itself to summary disposition. See 10 C. Wright & Miller, Federal Practice and Procedure § 2730, pp. 590-592 (1973). Cf. *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979).

Herbert v. Lando also casts serious doubt on the notion that the chilling effect of a long and expensive trial justifies a presumption in favor of summary judgment, at least to the extent that such a presumption exceeds the balance struck between the rights of publishers and defamation plaintiffs in *New York Times v. Sullivan*. The Court reiterated that the First Amendment does not provide a publisher complete immunity and that if "inhibition flows from the fear of damages liability for publishing knowing or reckless falsehood, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment." 441 U.S. at 171, 99 S.Ct. 1646, 60 L.Ed.2d 115. While the Court recognized the burden and expense of pretrial discovery in First Amendment defamation cases, that was not enough, it held, to modify the standard set in *New York Times v. Sullivan*. 441 U.S. at 175-77, 99 S.Ct. 1648-49, 60 L.Ed.2d 115.

Laying aside the suggestion that the potential chilling effect of the burdens of litigation are in and of them-

selves grounds for preferring summary judgment, an idea repudiated by *Herbert v. Lando*, the cases in this Circuit can be reconciled. These cases stand for the principle that the standard of review in First Amendment defamation actions, as in all summary judgment cases, is whether the record, construed in a light most favorable to the party against whom the judgment has been entered, demonstrates there are genuine issues of fact which, if proven, would support a jury verdict for that party. Since, however, a jury verdict in a defamation case can only be supported when the actual malice is shown by clear and convincing evidence, rather than by a preponderance of evidence as in most other cases, *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1258 (5th Cir. 1980), the evidence and all the inferences which can reasonably be drawn from it must meet that higher standard.

On this record we conclude the district court was confronted with a genuine issue of material fact on the details of investigator Riley's conversation with Rebozo, and reporter Kessler's review of it. In investigating the story, even though Kessler went to the trouble of calling Riley, he failed to review with Riley the words in Riley's earlier deposition upon which Kessler eventually based the article's lead. Regardless of whether Riley knew at the time of his conversation with Rebozo whether the pledged stock had in fact been stolen, the seminal question may be what Riley actually told Rebozo before the stock was sold to cover the loan. We note in passing that on the second appeal in the conversion case, the Court found that not until December 1968, nearly two months after the stock sale, did E. F. Hutton learn that the stock involved in this case was among those shares that had been missing from its vault. *Fidelity & Casualty Co. v. Key Biscayne Bank*, 501 F.2d 1322, 1324 (5th Cir. 1974). Despite Kessler's professed belief in the veracity of Riley's deposition testimony, Kessler's

resolution of the obvious ambiguity whether Riley told Rebozo the stock was (a) missing, (b) stolen, or (c) missing or stolen, in favor of the most potentially damaging alternative creates a jury question on whether the publication was indeed made without serious doubt as to its truthfulness. *St. Amant v. Thompson*, 390 U.S. at 732, 88 S.Ct. at 1326.

There is, moreover, a material question of fact suggested by Kessler's October 6, 1973 memorandum to his editor, in which the reporter expressed uncertainty about whether the Key Biscayne Bank or Rebozo himself cashed the stock. Kessler stated in that memorandum that if the bank, rather than Rebozo, had actually cashed the stock, the article's proposed lead paragraph would have to be modified. This memorandum, plus the fact that Kessler resolved the uncertainty expressed in it in such a way as to cast plaintiff Rebozo in the worst possible light and to make for Kessler a front-page story of an episode which otherwise might not have commanded any significant attention, when taken in a light most favorable to Rebozo, could amount to evidence of the reporter's reckless disregard for the truth or falsity of the assertion that "Charles G. (Bebe) Rebozo, President Nixon's close friend, cashed $91,500 in stolen stock . . . ." *See St. Amant v. Thompson*, 390 U.S. at 731-32, 88 S.Ct. at 1325-26; *New York Times v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26. Thus we cannot say "the record is devoid of genuine issues of fact as to whether the alleged defamatory statement was published with actual knowledge of its falsity or with reckless disregard of whether it was true or false." *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d at 865. Accordingly, the district court's summary judgment on the question of actual malice is reversed and the case is remanded for further proceedings.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 73-1728-Civ-SMA

CHARLES G. REBOZO,
Plaintiff,

vs.

THE WASHINGTON POST COMPANY,
Defendant.

ORDER

Upon consideration of the Defendant's Motion for Summary Judgment, the Memoranda of Law in support thereof and opposition thereto, the Statement of Material Facts as to Which Defendant Contends There is No Genuine Issue, Plaintiff's Statement of Material Disputed Facts, the affidavits submitted by both parties, and the depositions and documentary evidence in the record;

And after hearing oral argument on the Motion on eptember 18, 1978;

The Court finds as a matter of law as follows:

1. Except to the extent that this Court, by separate order, has stricken certain factual assertions contained in the Statement of Material Facts as to Which Defendant Contends There Is No Genuine Issue, all factual assertions contained in that Statement will be deemed admitted.

2. There is no genuine issue as to any material fact in this case, and summary judgment should be entered as a matter of law under the principles set forth in *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F. 2d 858 (5th Cir. 1970) and cases cited therein. See also *Wolston v. Reader's Digest Ass'n.*, 578 F. 2d 427 (D.C. Cir. 1978).

3. The Court finds that there is no genuine issue of material fact that plaintiff Charles G. Rebozo had achieved such pervasive fame and notoriety as of October 25, 1973, the date of publication of the article at issue in this lawsuit, that he had become a public figure "for all purposes and in all contexts," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

4. The Court makes the alternative finding that there is no genuine issue of material fact that plaintiff Charles G. Rebozo was, as of October 25, 1973, a public figure for the limited range of issues relating to banking, the Key Biscayne Bank, and the particular transactions that were the subject of the article in question. *Ibid.*

5. The Court finds that there is no genuine issue of material fact with respect to the existence of "actual malice" under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny. The record in this case contains no evidence from which a determination could be made that the article at issue was published with "actual malice."

6. On the basis of the foregoing, the defendant is entitled to judgment as a matter of law.

Accordingly, IT IS HEREBY ORDERED this 29 day of September, 1978, that the Defendant's Motion for Summary Judgment is granted and the complaint is dismissed with prejudice, each party to bear its own costs.

/s/ Sidney M. Aronovitz
SIDNEY M. ARONOVITZ
United States District Judge

cc: Patricia A. Seitz, Esq.
Alan G. Greer, Esq.
Kevin T. Baine, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 73-1728-Civ-SMA

CHARLES G. REBOZO,
Plaintiff,

vs.

THE WASHINGTON POST COMPANY,
Defendant.

ORDER

Upon consideration of the Plaintiff's Motion to Strike, the Memoranda of Law in support thereof and opposition thereto;

And after hearing oral argument on September 18, 1978;

IT IS HEREBY ORDERED THIS 29 day of September, 1978, that the Motion is granted in part and denied in part as follows:

1. The Court grants the Motion to Strike those items contained in Exhibit K to the Defendant's Motion for Summary Judgment which are dated after October 25, 1973.

2. The Court grants the Motion to Strike those items contained in Exhibit L to the Defendant's Motion for Summary Judgment which are dated after October 25, 1973.

3. The Court grants the Motion to Strike those items contained in Exhibit M to the Defendant's Motion for Summary Judgment which are dated after October 25, 1973.

4. The Court grants in part and denies in part the Motion to Strike paragraphs 6, 8, 9, 18, 22, 25, 26, 27,

28, 29, 30, 32, 35, 42, 44, 47, 58, 64, 65, 66, 76, 91 and 125 of the Statement of Material Facts as to Which Defendant Contends There Is No Genuine Issue. The Court strikes the factual assertions contained in those paragraphs to the extent that those factual assertions report the occurrence of events that can be determined from the face of the assertions to have occurred after October 25, 1973, and to the extent that they report the publication of matters that can be determined from the face of the assertions to have been published after October 25, 1973. To the extent that the factual assertions contained in the paragraphs numbered above report the occurrence of events or the publication of matters up to and including October 25, 1973, or on dates that are not apparent from the face of those assertions, the assertions are not stricken.

SO ORDERED.

/s/ Sidney M. Aronovitz
SIDNEY M. ARONOVITZ
United States District Judge

cc: Patricia A. Seitz, Esq.
Alan G. Greer, Esq.
Kevin T. Baine, Esq.

[TRANSCRIPT OF HEARING]

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
SOUTHERN DISTRICT OF FLORIDA

No. 73-1728-Civ-SMA

CHARLES G. REBOZO,
Plaintiff,

vs.

THE WASHINGTON POST CO.,
Defendant.

United States Courthouse
300 Northeast 1st Avenue
Miami, Florida
September 18, 1978.

The above-entitled matter came on for Special Hearing —Motion for Summary Judgment, before the Honorable SIDNEY M. ARONOVITZ, United States District Judge, pursuant to Notice.

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[188] THE COURT: Thank you very much, Lady and gentlemen, for a very enlightening oral argument and certainly for the Memorandum Briefs and all of the other assistance and the very diligent effort and work that has gone into this product.

This Court has considered the Motion to Strike by the Plaintiff herein, addressed to certain of the exhibits attached to and referred to as a part of the Defendant's Motion for Summary Judgment, and has examined the Motion for Summary Judgment filed herein by the defendant.

It has examined the record, studied the applicable portions, has read the Memorandum Briefs, the various affidavits, the pertinent testimony, and has heard the oral arguments of counsel.

[189] The Court first grants the motion to strike by the plaintiff in part, as to Paragraphs 1, 2, and 3, as set forth in the motion to strike. Those items which appear as exhibits and are public and dated post-October 25, 1973, the date of the article in suit herein, are stricken.

All others in Paragraph 1, 2 and 3, remain instanter.

As to Paragraph 4, those numbered paragraphs are the defendant's statement of material facts set forth therein, which are susceptible of determination on their face as having occurred subsequent to or which relate to matters published subsequent to October 25, 1973, are stricken.

There are some that bear no date and if they don't bear a date, they can't be determined and they are not stricken. All others that appear shall remain as admitted.

Now, this Court further finds and holds that under the law in this Circuit, represented by Bon Air Hotel, Inc. versus Time, Inc., et al., 426 F. 2d, 858, wherein before the Court, Judge Rives said at Page 864:

> "Thus it is clear that where a publication is protected by the [190] New York Times Immunity Rule, summary judgment rather than trial on the merits is a proper vehicle for affording constitutional protection in the proper case."

"See also Time, Inc. v. McLaney," which is cited in that same case, to a like effect; and, "See also the concurring opinion of Judge Skelly in Wasserman v. Time, Inc., 424 F. 2d 920, and the more recent opinion of Wolston v. Reader's Digest Association, 578 F. 2d 427."

Accordingly, this Court must determine whether or not summary judgment is a proper vehicle that should be

exercised in the determination of the issues in this case.

This Court first holds and finds that in accordance with Gertz and, of course, New York Times and its other progeny, that Mr. Rebozo is an individual who, at the time of the publication of the article in suit, had achieved such persuasive fame or notoriety that he had become a public figure for all purposes and in all context.

This Court further finds, alternatively, that Mr. Rebozo, at the time of the publication of the article in suit, had also achieved notice as a [191] public figure and was a public figure for the limited purpose as a banker and that the subject matter of the article in suit was about the bank and banking, relating to the Key Biscayne Bank of which he was president and chief executive officer.

Thereupon, this matter, being required to be determined on the basis of New York Times versus Sullivan, and having ascertained and held that Mr. Rebozo was a public figure, there next comes the question of whether or not the actual malice, as defined in the New York Times case existed and has been proven, and the Court finds that it has not been proven or established and that there is no genuine issue of disputed fact with regard thereto.

Consequently, this Court finds and holds that summary judgment should be and is hereby granted and entered as to the defendant in accordance with the motion, and final judgment will be entered herein, each side to bear its own expense, respective costs, in this action.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3403

D. C. Docket No. 73-1728-CIV-SMA

CHARLES G. REBOZO,
Plaintiff-Appellant,
Cross Appellee,

versus

THE WASHINGTON POST COMPANY,
Defendant-Appellee,
Cross Appellant.

Appeals from the United States District Court
for the Southern District of Florida

Before WISDOM, RONEY and HATCHETT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the defendant-appellee pay to the plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

February 19, 1981

A True Copy
Attested:
Clerk
U.S. Court of Appeals
Fifth Circuit

By: /s/ Deborah W. Cannon
Deputy Clerk
Atlanta, Ga.

Issued as Mandate: May 12, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 78-3403

CHARLES G. REBOZO,
Plaintiff-Appellant-
Cross-Appellee,

versus

THE WASHINGTON POST COMPANY,
Defendant-Appellee-
Cross-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING

(April 29, 1981)

Before WISDOM, RONEY and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

ARTICLE

The Washington Post, Oct. 25, 1973:

BEBE REBOZO SAID TO CASH STOLEN STOCK

By Ronald Kessler

Washington Post Staff Writer

Charles G. (Bebe) Rebozo, President Nixon's close friend, cashed $91,500 in stolen stocks in 1968 after he was told by an insurance investigator it was stolen, the investigator's sworn statement and other records in a Miami court file indicate.

A lawyer for Rebozo conceded the investigator visited Rebozo but said Rebozo "flatly denies" the investigator told him the stock was stolen.

The $91,500 in securities represented 300 of the 900 shares of International Business Machines Corp. stock that federal prosecutors say was stolen by the Mafia in 1968 from the vaults of E. F. Hutton & Co., a New York stock brokerage firm.

The stock came into Rebozo's possession when it was offered as collateral for a loan from Rebozo's bank, Key Biscayne Bank in Florida.

In a civil suit filed against the bank by Hutton, Rebozo said in a deposition that he gave the loan at the request of an old friend, Walter A. (Jake) Jernigan.

The loan was given to a friend of Jernigan's.

In a deposition taken under oath, George H. Riley Jr., an insurance investigator with Continental Insurance Cos., said he attempted to tell Rebozo the stock was stolen in October, 1968, but Rebozo twice canceled the appointments.

During this time, records in the court file show, Rebozo was in the process of selling 600 of the 900 shares of stock and of receiving the proceeds of the sale.

Riley said that when he finally met with Rebozo and told him the 900 shares was stolen, Rebozo claimed he had already sold them.

However, the records in the court file show Rebozo did not sell the remaining 300 shares until more than a week after Riley's visit.

After the visit, Riley filed a report on the interview with his head office in New York. In it, he said Rebozo "did not talk freely" and Riley suspects Rebozo was aware the transaction was "shady."

Eight persons, four of them identified by prosecutors as members or associate members of the Mafia, were indicted in 1970 for conspiring to steal the stock. Except for a defendant who is a fugitive from justice and another who was placed in an insane asylum, all were convicted the following year.

When the indictments were announced, the Justice Department's Organized Crime Strike Force in Miami said no evidence had been developed that Rebozo was involved in the plot or was aware the stock was stolen.

It was not until after the criminal case was completed in late 1971 that Riley's deposition was entered in the civil suit court file. The contents of the deposition have never been previously reported.

Asked what he would do if there were evidence that Rebozo was told the stock was stolen before he sold it, Dougald D. McMillan, chief of the Strike Force, said:

"If we have evidence of a federal criminal offense involving anyone, we will pursue it, and if warranted, present the evidence before the grand jury."

Federal law provides a fine of up to $10,000 or a prison term of up to 10 years, or both, for anyone who knowingly stores, sells, disposes of, or accepts as collateral for a loan securities in interstate commerce that have been stolen or unlawfully converted.

Rebozo is Mr. Nixon's close friend. Based on publicly known transactions, he is Mr. Nixon's second-biggest benefactor, after their mutual friend, Robert H. Abplanalp.

Rebozo, born in 1912 in Tampa, Fla., of Cuban parents, had been in a succession of small businesses, beginning with a gasoline station and tire recapping business. Later, he operated laundromats and a small loans company.

Since Mr. Nixon became President in 1969, Rebozo has shown up frequently in his financial and personal affairs. He visits Mr. Nixon at his Camp David retreat, at his San Clemente home, and at the Bahamian Island owned by Abplanalp.

Rebozo was recently in the news as the recipient of $100,000 in cash said to be a campaign contribution from Howard Hughes to Mr. Nixon. However, the cash was delivered in 1969 and 1970 when Mr. Nixon was not in a campaign.

Rebozo's home in Key Biscayne is adjacent to Mr. Nixon's two homes, which were purchased with the help of Rebozo's lawyer and officer in his bank, Thomas H. Wakefield.

Abplanalp also serves as a director of Rebozo's bank in Key Biscayne.

The bank, chartered by the state and insured by the Federal Deposit Insurance Corp., opened its doors March 10, 1964, with Rebozo as chairman, president, and a stockholder. It is the only bank on the island.

Why this particular bank was chosen to give the loan that was secured by the stolen IBM stock is a mystery.

The borrower, Charles L. Lewis, had no account at the Key Biscayne Bank. An Atlanta investor, Lewis also had no business or residence in Miami.

Rebozo said in his deposition in the civil court file that he was told that the reason Lewis wanted the loan from his bank was that he planned to open a business in Miami and wanted to establish a banking "connection" there.

However, Lewis never did open a business in Miami.

The story of the loan transaction, as told by the participants in their depositions in the court file, began when Jernigan called Rebozo and asked if he would give a $195,000 loan using stock as collateral to his friend and associate, Lewis.

The idea behind pledging stock as collateral for a loan, as Lewis did to get a loan from Rebozo's bank, is not unlike the idea behind a home mortgage loan or a car loan.

If the borrower defaults on his payments, the bank can sell the stock, home, or car to pay off the loan. The procedures for obtaining such loans are also not dissimilar, bankers say.

The borrower normally visits the bank and makes out an application. He states the reason he wants the money. Normally, the bank requires that the applicant live in the area and have an account at the bank.

The bank checks the applicant's credit, usually through a credit bureau. It also checks to make sure the collateral —home, car, or stock—is legally the property of the applicant.

If all the requirements are met, the borrower is notified and comes in for his money.

These procedures are familiar to anyone who has taken a bank loan. They differ markedly from those used by Rebozo, the court papers indicate.

After Jernigan proposed the loan to Rebozo on the telephone, Jernigan and Lewis visited the bank on July 30, 1968. Within several hours, the court documents indicate, they applied for the loan, gave the stock as collateral, and received the money through a checking account opened in Lewis' name the same day.

The $195,000 loan was payable at $10,000 per quarter or on the demand of the bank. The interest rate was 7½ per cent per year.

A copy of the loan application filled out by a bank loan officer shows some spaces were left blank, including "recommendations of loan committee."

The copy of the application lists as collateral 900 shares of IBM stock computed at $338.75 per share, or a total of $304,875.

Wakefield, Rebozo's lawyer and an officer in the bank, said in his deposition in the court file the loan committee had given tentative approval to the loan a week earlier in a telephone poll. He said the committee did not know at the time exactly what type of collateral was being offered to secure the loan.

The loan application lists as the purpose of the loan, "Business needs—(Nationwide A/L) & buy out other party." Nationwide Airlines was a small airline of which Lewis was an officer.

Although the Federal Reserve Board, which regulates stock loans, says loan officers must be aware of the purpose of a loan, Rebozo said he had never heard of the airline listed, and he said he did not ask the name of the other party who was to be bought out.

Lewis swore in a Federal Reserve form that the statement made on the loan application was the true purpose of the loan, but he later acknowledged in his deposition that the money was not used for this purpose. Instead, Lewis said, he gave most of the money to representatives of "Henry Sturgeon," who, according to prosecutors, turned out to be fictitious.

Lewis said Jernigan was aware the money was going to Sturgeon rather than for the purpose Lewis had claimed, but the bank was not.

The testimony of Rebozo and others involved indicates no check was made on Lewis' background through a credit bureau. Instead, Rebozo said, he called Lewis' office in Atlanta to verify that he had an office.

After the money was given to Lewis, Rebozo said he felt he should make additional checks. He called F. Donald Nixon, the President's brother, because he lived in Newport Beach, Calif., where Lewis said he had another office, Rebozo said.

Rebozo said he asked the brother to "check into the local bank out there to see if there was anything wrong with this fellow. And he phoned, checking back in Newport Beach."

Rebozo did not say what, if anything, Donald Nixon reported back, nor why he called Donald Nixon instead of the bank in Newport Beach.

Donald Nixon, a vice president of Marriott Corp., the hotel and restaurant chain, did not return a reporter's telephone calls.

The only other information Rebozo said he had about Lewis was that he had been introduced by Jernigan, who vouched for his reputation. Rebozo said he did not have Jernigan cosign the note obligating Lewis to repay the loan.

When a bank gives a mortgage loan, it determines that the house is legally the property of the borrower by having a lawyer or title insurance company search the land records covering the house. If the collateral for a loan is a car, the bank requires a bill of sale or title certificate.

When stock is used as collateral, the ownership normally is self-evident, because the stock certificates list the owner's name and address on the face.

The name of the owner is not always listed. Sometimes the certificates are issued in the name of the stock brokerage house that ordered them. The brokerage house keeps the stock until the owner orders it sold.

When stock is issued in this form it is called "street name" stock. Street name stock may be requested by a stock brokerage customer if he intends to sell the stock quickly or wishes to conceal his ownership of it. If he buys the stock on credit, it must be in the street name.

Whatever the reason, bankers and stock brokers say, a customer who owns street name stock and wants to use it as collateral for a loan invariably transfers it to his own name before he presents it to the bank.

The reason is that it is difficult for a bank to tell who is owner of the stock if it is in street name. Some banks, such as Bankers Trust Co. in New York, say they refuse to give any loans for street name stock. A vice president for security at the bank says the risk that the stock is stolen is too great.

Other banks, such as Chase Manhattan Bank in New York, say they will accept street name stock only if the borrower is a long-standing customer and if he presents evidence that the stock is his.

This evidence may be a letter or transfer slip saying the stock was transferred to the customer from the broker. The bank can then call the broker to verify that

the transfer took place. This is done by citing the customer's account number listed on the transfer form.

The stock that Lewis offered as collateral for the $195,000 loan from Rebozo's bank was in street name, the name of E. F. Hutton. Rebozo said he noticed this fact, but he said the only evidence he asked for or obtained that Lewis was the owner of the stock was Lewis' statement that he owned it.

Lewis said in his deposition that he was never asked if he owned it.

Rebozo said he also noticed that the stock had been issued two years earlier, and he said he asked Jernigan how Lewis had obtained it. Jernigan said he got it in a stock swap. Rebozo said he never asked the name of the person with whom Lewis had swapped the stock.

"It was of no concern," he said. "Swap stock, people do it all the time, and they swap value for value."

Rebozo said he accepted the stock and had it transferred to Lewis' name. The next day, however, Rebozo said he had second thoughts about the stock, and he or Wakefield made calls to IBM and Hutton.

Rebozo said he also called James M. Crosby, chairman of Resorts International, Inc., which owns a gambling casino on Paradise Island off the coast of Nassau in the Bahamas.

He said he called Crosby, a friend, to get help in checking out the stock. Resort International owns Intertel, an investigative agency.

Rebozo said Crosby called IBM to determine if the stock was stolen.

Wakefield said he asked a man at Hutton if he thought the stock certificates sounded counterfeited, based on Wakefield's description over the telephone of the color of the certificates and the appearance of the signatures.

Wakefield said the man, whose name he did not know, said the securities sounded as if they were genuine.

An IBM employee said in a deposition in the court file that he checked to see if the stock was stolen and reported to Rebozo that it was not.

Thomas P. Lynch, executive vice president of Hutton, said there was no way for IBM to know whether the stock was stolen. He said this was because Hutton did not know at the time it was missing.

Lynch said Hutton and other brokerage houses do not count the stock in their vaults daily. Between checks, he said, stock may be taken without anyone knowing.

For this reason, he said, the only way a bank can tell that a borrower owns street name stock is to ask him for his account number with the broker and to call the broker.

"He (Rebozo) did everything except what he was supposed to do," Lynch said.

Lynch said it also is unusual for a bank to give such a large loan on street name stock.

Two of the country's largest banks, First National City in New York and Chase, said they would consider a $195,000 loan to be large and would take unusual precautions when giving it.

The two banks' assets of $37.3 billion and $26.1 billion, respectively, compare with $7.7 million for Rebozo's bank in 1968. (Because of the loan's size, Rebozo's bank shared it with another Miami bank.)

The Hutton firm eventually discovered that the stock was stolen, and the FBI traced it in early October to Rebozo's bank. Lynch said it was traced from IBM records showing the bank had the stock transferred to Lewis' name.

Prue C. Clinkscales, an FBI agent, visited the bank and looked at its file on the loan, but according to Rebozo, Clinkscales praised him for making checks on the stock.

"I asked him if there was anything wrong with the stock," Rebozo said, and Clinkscales replied, "We don't have any knowledge of that; we were just asked to see your files."

Attempts to determine if Clinkscales knew the stock was stolen, and if so, why he did not tell Rebozo, were unsuccessful. Agent Clinkscales told a reporter he had no comment and would not listen to any questions.

Rebozo said that "immediately" after the visit from Clinkscales, he decided to cancel the loan.

Asked why, he said, "Actually, from the beginning some of the directors didn't like the loan. They thought that since the man didn't live and work in our community, and since the fact that it was in street name originally, and we had to go through all this effort to do it . . . I had gone on the assurances that he was going to establish a business in Miami, and expected him to maintain a compensating balance in accordance with general banking procedures. And the combination of circumstances that ensued dictated it would be prudent to call the loan."

Wakefield noted that a state banking examiner had criticized the bank for making such a large loan to someone outside the bank's geographic area.

"I said, couple that (the FBI inquiry) with what the bank examiner's comments had been, I thought we ought to call the loan," Wakefield said.

If Rebozo had canceled the loan and it had been repaid from Lewis' own funds, there would have been no loss to Hutton. But a telegram from Rebozo to Lewis dated Oct. 7, 1968, shows Rebozo gave Lewis two days to come up with the money.

Lewis said in his deposition that he told Rebozo he could not get the money "in the period of time that he was willing to give us (Lewis and his business associates)."

Rebozo was not asked in his deposition why he allowed Lewis only two days to pay off the loan.

Whatever the reason, Lewis did not come up with the cash. Rebozo decided to sell the stock that had been put up as collateral, causing the loss to Hutton, which owned the stock.

Rebozo sold 600 of the 900 shares, producing $196,984, which was enough to pay off the loan. He continued to hold the remaining 300 shares.

Records in the court file show the first batch of stock was ordered sold Oct. 8, 1968, and the check for the proceeds was dated Oct. 17.

Riley, the insurance investigator, said in his deposition that he visited the bank on Oct. 12 or 13, after he was asked by his New York office to determine if Rebozo's bank had Hutton's stock. Hutton was insured by Riley's company.

Riley said he told the bank's loan officer he was there to investigate some stolen securities, but the officer said only Rebozo could discuss the matter.

Riley said he made appointments with Rebozo for Oct. 14 and 17, but each time they were canceled.

"On at least one occasion," he said, "his (Rebozo's) secretary stated that he was busy, and it was during the time of the Nixon campaign, and this was the excuse; that he was too busy to see me," Riley said.

The second appointment was canceled the day the check for the proceeds of the first 600 shares of stock was issued.

Five days later, Riley met with Rebozo. Riley said he told Rebozo at this meeting on Oct. 22 that he wanted to determine if the bank had the stolen stock.

Riley said Rebozo told him he already had given all the information to the FBI. However, Riley said Rebozo did show him the certificate numbers of the stock as they appeared before the stock was transferred to Lewis' name.

The questioning of Riley in his deposition continued:

Q. Did you tell Mr. Rebozo at that time that the stock had been stolen or was missing from E. F. Hutton & Co.?

A. Yes, sir.

Q. Can you recall exactly what you told him?

A. As I previously stated, I advised Mr. Rebozo that I was investigating the theft of nine 100-share certificates from the vaults of E. F. Hutton & Co. in New York.

Q. Did you advise him of the numbers of the certificates that you were investigating?

A. Yes. And the numbers corresponded to the numbers he gave me.

The next day, Riley wrote in a report to his New York office that Rebozo claimed he already had sold all the stock.

The report was supported by a deposition of Riley's superior, who said Riley gave him an oral rundown on the interview after it took place.

In the report, Riley said, "It should be pointed out that I do not believe Mr. Rebozo was giving me all the information available to him, and he would not go get his file . . . This would appear to me to be a shady deal, and I suspect that Mr. Rebozo is aware of this and did not

want to become involved, which accounts for his reluctancy in his discussion with me. He did not talk freely, and the information that was obtained was difficult to extract."

Asked in his deposition why Rebozo would not get his file on the loan, Riley said, "I can say that Mr. Rebozo didn't even want to give me the time of day, let alone get his file."

Asked in a telephone interview if prosecutors were aware of his testimony, Riley, an insurance investigator 20 years, said not to his acknowledge [sic]. He declined to discuss the case further.

Rebozo did not return repeated telephone calls from a reporter. Rebozo's lawyer, Alan G. Greer, told The Washington Post that Rebozo "flatly denies" having been told the stock was stolen. Greer said Riley met with Rebozo, with only Rebozo and Riley present, and that Riley did not say the stock Greer said Riley met with Rebozo, [sic] was stolen.

The court files show that a day after Riley's visit, Rebozo wrote to Lewis to ask him if he wanted the remaining 300 shares of stock sold. The letter enclosed Lewis' note, marked "paid," meaning Lewis no longer was under obligation to the bank.

The letter to Lewis closed this way:

"Everything thus far has worked out well for both of us and if I receive any further information with respect to the matter involving the certificates, I will let you know immediately."

Asked in his deposition what this meant, Rebozo said, "That must have been in reference to the inquiries made (by the FBI)."

The remaining 300 shares were ordered sold Oct. 31, more than a week after Riley's visit to Rebozo. The check was dated Nov. 13.

Rebozo's lawyer, Greer, said in a telephone interview that the stock was sold by "the bank," not by Rebozo. However, the court file shows that the slip confirming the sale, the receipt for the securities, and the check with proceeds of the sale were all marked to the attention of Rebozo.

The money from the sale, $91,574, was credited to Lewis' account at Rebozo's bank. On Dec. 16, Lewis withdrew most of the money from his account, a copy of his bank statement shows.

This was nearly two months after Riley said he told Rebozo the stock was stolen.

Lewis said he gave $120,000 of the total cash he received from the loan to representatives of the fictitious Sturgeon. He said he used the rest in business ventures.

None of the money was recovered, and the insurance company reimbursed Hutton for its loss in December.

In May, 1970, the insurance company sued the bank in an attempt to recover the money. The bank later sued Hutton and Lewis, and Hutton sued the bank. These separate actions are all part of the same case.

The insurance company's complaint, 1½ pages long, said only that the bank had illegally converted the stock to its own use when it changed the name on the stock certificates to Lewis'. The complaint, and the legal case, did not deal with Rebozo's subsequent sale of the stock after Riley said he told Rebozo it was stolen.

U.S. District Court Judge James L. King, who was appointed by President Nixon in 1970, ruled in favor of the bank last year. The actions by Key Biscayne Bank against Lewis and Hutton were withdrawn.

"We tried the case on a narrow legal issue, conversion," John R. Hoehl, the Miami lawyer who presented

the case for the insurance company, said in an interview. Conversion is an act that deprives someone of his property.

"It backfired on us," Hoehl said. "We felt we didn't have to show what they should have done" to determine whether the stock was owned by Lewis.

A transcript of the one-day trial Jan. 24, 1972, shows Judge King shut off discussion of procedures normally used by banks to determine if street name stock is owned by a loan applicant. He compared such testimony to a witness giving an opinion in a car accident case on who was negligent.

Judge King said this was up to the

In 1963 and 1964, Judge King, then a Miami lawyer, was a director of Miami National Bank when it was indebted through a mortgage to the Teamsters Union pension fund.

Judge King's fellow directors included Lou Poller, later named as unindicted coconspirator with Meyer Lansky for allegedly skimming profits from a Las Vegas hotel; Alan M. Kornbluh, who has acted as trustee on a teamster mortgage and is Poller's son-in-law; and Arthur A. Desser, a friend of former Teamster President James R. Hoffa.

Judge King said he was not aware of the Teamsters mortgage at the time he was a Miami National Bank director. "If I had known of any Teamster involvement, I would not have served," he said.

The Key Biscayne Bank case was appealed June 7, 1972, to the Fifth Circuit Court of Appeals in New Orleans. The Appeals Court recently sent the case back to Judge King for a more explicit, written opinion.

The stolen stock, according to the original criminal indictment, had been given to Lewis' lawyer, Martin Fox of New York, by mobsters Joseph (Joe Black) Lamattina and Daniel Mondavano.

They obtained the stock from Jacob (Jake the Mace) Maislich, the indictment said. Maislich pleaded guilty in another stolen securities case involving Anthony (Fat Tony) Salerno and Gilbert (Gil the Brain) Beckley.

LETTER

October 4, 1973

Mr. Ronald Kessler
The Washington Post
1150 15th Street
Washington, D.C. 20005

Dear Mr. Kessler:

On October 4, 1973 you called me while I was out of my office and I returned your call. Our phone conversation concerned the case of *The Fidelity and Casualty Company of New York, et al v. The Key Biscayne Bank*, Case No. 70-619-Civ-JLK, United States District Court for the Southern District of Florida.

You indicated to me that you were writing a story for your employer, The Washington Post, concerning that case. You generally and specifically made certain allegations that our client, Mr. C. G. Rebozo, knew that the IBM stock which was the subject of that suit was stolen prior to the time that Mr. Charles L. Lewis sold the last three hundred (300) shares of that stock through The Key Biscayne Bank. You based those allegations on a purported pre-trial stipulation of the parties to that effect and the deposition of Mr. George H. Riley, Jr.

Any reading of the record in the above case will show that those allegations are totally unfounded and scurirlous [sic]. There is no such joint stipulation in existence. The only pre-trial stipulations which were ever entered into on behalf of The Key Biscayne Bank are a unilateral one filed by the Bank and a partial joint pre-trial stipulation signed on behalf of all of the parties to the action. Copies of those two stipulations are attached hereto. There is no mention nor admission in those documents to the effect that the Bank or Mr. Rebozo knew the stock was stolen prior to its sale.

The Plaintiffs in the case did propose such a stipulation in their proposed pre-trial stipulation, but the Bank refused to agree to it since it was untrue.

Mr. Riley in his deposition does make the allegation that he told the Bank and Mr. Rebozo, in a meeting with only he and Mr. Rebozo present, that the stock was stolen. Mr. Rebozo flatly denies having been given such information. In Mr. Rebozo's deposition he states that the only inquiries into the stock prior to its sale were made by FBI agents who assured the Bank that the stock was not stolen and that there was nothing wrong with it.

Further, any reading of the remaining depositions and other evidence in the case, plus any independent investigation you will or have made, will clearly show that Mr. Riley's allegations are entirely unfounded and untrue. In fact, all of the evidence points directly to the contrary. The Plaintiffs' top representatives have stated in their depositions that they turned the entire matter over to the FBI and police and for this reason they made a conscious decision not to contact the Bank even though they knew the Bank was holding the stock in question.

I would also point out to you that the Plaintiffs in the trial of this matter did not even attempt to put Mr. Riley's testimony into evidence. Further, the trial court found that not only was the Bank not guilty, but that the Bank had acted in an entirely correct and proper manner.

The purpose of this letter is to put you on notice prior to your writing any article of the true and correct facts of the matter. I have been instructed by Mr. Rebozo and the Bank to inform you that if in light of these facts you and your employer, The Washington Post, should publish any article containing false and/or derogatory material that constitutes a libel and/or slander of The Key Biscayne Bank or Mr. Rebozo, which act would be

in reckless disregard of the truth as it has been demonstrated to you, legal action will be instituted against both you and The Washington Post.

This letter has been read to you on the phone by my secretary on October 4, 1973 to insure that you have this information prior to publishing any article concerning these matters.

Yours truly,

ALAN G. GREER

AGG/sjb

Enclosure

cc: Editor, The Washington Post

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 73-1728-Civ. SMA

CHARLES G. REBOZO,
Plaintiff,

v.

THE WASHINGTON POST COMPANY,
Defendant.

STATEMENT OF MATERIAL FACTS AS TO WHICH DEFENDANT CONTENDS THERE IS NO GENUINE ISSUE

Pursuant to Rule 10(J) of the General Rules of this Court, defendant The Washington Post Company states that it contends there is no genuine issue as to any of the following material facts:

I. *INTRODUCTION: THE ARTICLE*

1. On October 25, 1973, The Washington Post published an article entitled "Bebe Rebozo Said to Cash Stolen Stock," under the by-line of Ronald Kessler. The article is attached as Exhibit A and is incorporated herein by reference.

2. The October 25th article in the Post was addressed to a stock transaction that was then the subject of a lawsuit between E.F. Hutton & Co. and the Key Biscayne Bank. (*The Fidelity and Casualty Co. v. The Key Biscayne Bank*, No. 70-619-Civ-JLK.) E.F. Hutton had sued the Key Biscayne Bank for the alleged conversion of certain IBM stock that had been stolen from E.F. Hutton's vaults in New York.

3. The October 25th Post article reported portions of the testimony in the above-mentioned case. The lead

sentence of the Post article reported that the plaintiff in this suit, Charles G. ("Bebe") Rebozo, had "cashed $91,500 in stolen stocks in 1968 after he was told by an insurance investigator it was stolen, the investigator's sworn statement and other records in a Miami court file indicate." The second sentence of the article stated that Rebozo, through his lawyer, "flatly denies" that the investigator told him the stock was stolen.

III. *PREPARATION OF THE ARTICLE*

140. Ronald Kessler was the *Post* reporter who researched and wrote the October 25th article that is the subject of this suit. Affidavit of Ronald Kessler (hereafter "Kessler Affidavit") ¶ 4.

141. Kessler has been employed as a reporter for *The Washington Post* since 1970. He has worked continuously as a journalist and reporter since 1964, having been previously employed by the *Worcester Telegram*, the *Boston Herald-Traveler*, and the *Wall Street Journal*. Kessler Affidavit ¶ 1.

142. Kessler holds a number of awards for reporting, including the American Political Science Association Public Affairs Reporting Award (1965); the George Polk Memorial Award (1973); the United Press International first prize in newswriting (1967); the American Association of University Women Public Affairs Reporting Award (1972); and the Maryland-Delaware-District of Columbia Press Association Public Service Award (1973). Kessler Affidavit ¶ 2.

143. Kessler has specialized in investigative reporting, and has written a number of stories on financial and banking matters. Kessler Affidavit ¶ 3.

144. Kessler's interest in the transaction that is the subject of the October 25th *Post* article was based on a six part series on Mr. Rebozo, his financial affairs, and

his relationship to President Nixon, published in *Newsday* in October 1971. Exhibit B. The third part of this series addressed itself to the IBM stock transaction in question. Since the *Newsday* article mentioned the civil suit over the IBM stock and was written prior to the conclusion of that suit, Kessler decided to check the court file to determine whether it contained anything that had not been reported in the *Newsday* article. Kessler Affidavit ¶ 5. Kessler Deposition 22.

145. Kessler spent two days reading the entire court file of the civil case, which was then on appeal. He made photocopies of some of the documents contained in the file, including the deposition of George H. Riley, Jr., and took notes on others. Kessler Affidavit ¶¶ 6-7; Kessler Deposition 41-45, 371.

146. George H. Riley, Jr., an insurance investigator, testified in his deposition in the civil case that he was asked in mid-October 1968 "to contact Key Biscayne Bank to determine if stock which had been stolen from our insured's vault was pledged as collateral for a loan at The Key Biscayne Bank." (P. 5) Riley further testified that on October 12 or 13 he drove to the Key Biscayne Bank and informed a loan officer named Mr. Stearns that he "represented the bonding company for E. F. Hutton & Co." and that he "was there to investigate some stolen stock certificates." (P. 6) Mr. Stearns indicated, according to Riley's testimony, that Mr. Rebozo was the only party who could assist him. Mr. Riley testified that he made appointments with Mr. Rebozo for October 14 and October 17, neither of which were kept by Rebozo, and that he talked to Rebozo on October 22, 1968. (P. 7) Under questioning by Mr. Rebozo's counsel, Riley testified as follows:

> "Q. Did you tell Mr. Rebozo at that time that the stock had been stolen or was missing from E. F. Hutton & Co.?
>
> A. Yes, sir.

Q. Can you recall exactly what you told him?

A. As I previously stated, I advised Mr. Rebozo that I was investigating the theft of nine-100-share certificates from the vaults of E. F. Hutton & Co. in New York.

Q. Did you advise him of the numbers of the certificates that you were investigating?

A. Yes. And the numbers corresponded to the numbers he gave me." (P. 10)

147. After reading the entire court file, Kessler called Riley to get any additional comments he might wish to make on his visit with Mr. Rebozo. Kessler told Riley that he intended to use Riley's deposition testimony in a story and asked Riley whether he understood the significance of his testimony, in view of the fact that other documents in the court file indicated that Mr. Rebozo did not sell 300 of the IBM shares until after Riley's visit. Riley indicated that he did understand the significance of his testimony, and in response to further questioning indicated that to his knowledge prosecutors were not aware of his testimony. Riley then informed Kessler that he did not want to discuss the case any further because the case was in litigation. Kessler told Riley that if there was anything that he wanted to add to his testimony he could give Kessler a call. Kessler Affidavit ¶ 9; Kessler Deposition 52-57.

148. Since Riley's testimony was the sworn testimony of a professional insurance investigator describing a meeting in which he was a participant, Kessler considered it to be a trustworthy source of information. Nothing that Riley said, or failed to say, in his telephone conversation with Kessler led Kessler to believe that Riley wished to alter his testimony in any way. Kessler Affidavit ¶ 10; Kessler Deposition 54, 57, 167.

149. Kessler discussed the IBM stock transaction on several occasions with Thomas P. Lynch, the executive

vice president of E. F. Hutton & Co. who had testified at a deposition and at the trial of the civil suit. He also discussed the case with the attorneys in the case and Judge James L. King. Kessler Affidavit ¶ 11.

150. In the course of his preparation of the October 25th article, Kessler discussed the IBM transaction with a number of experts. He discussed the legal implications of Mr. Riley's testimony with Dougald D. McMillan, chief of the Justice Department's Organized Crime Strike Force in Miami; Gary Betz, an assistant to Mr. McMillan; Martin Lobel, a Washington D.C. attorney and former aide to Senator William Proxmire on banking activities; Robert M. Morgenthau, U.S. Attorney for the Southern District of New York; and several attorneys in the office of the U.S. Attorney for the District of Columbia. He discussed applicable banking regulations and practices with Rene W. LaCoste at the Federal Reserve Board, and numerous experts in banking and securities industries. Kessler Affidavit ¶ 12.

151. Kessler has compiled a list of sources for every paragraph in the October 25th article. That list is attached as an Exhibit to Kessler's affidavit and is hereby incorporated by reference. *See* Kessler Affidavit ¶ 13.

152. Kessler attempted to discuss the IBM transaction, and specifically Mr. Riley's testimony, with Mr. Rebozo, but Mr. Rebozo declined to discuss the matter with him. Kessler Affidavit ¶ 14.

153. Since Kessler was unable to discuss Riley's testimony with Mr. Rebozo, the only other participant at the October 22 meeting with Riley, he called Rebozo's attorney, Alan G. Greer, Esquire, to get his comments. Mr. Greer told Kessler that Rebozo "flatly denies" that Riley told him the stock was stolen during their October 22 meeting. The *Post* reported this denial in the second sentence of the article. Kessler Affidavit ¶ 15.

154. After Kessler spoke to Mr. Greer on the telephone, he received a letter from Mr. Greer, dated October 4, 1973, raising the possibility of a libel suit against the *Post* if it published an article reporting the substance of Mr. Riley's testimony. Exhibit H. After Kessler read Mr. Greer's letter, he checked the information contained in the story once again by reviewing his notes and the court documents in his possession. Kessler Affidavit ¶ 16.

155. Harry Rosenfeld was the editor for the article that is the subject of this suit. Affidavit of Harry Rosenfeld (hereafter "Rosenfeld Affidavit") ¶ 3.

156. Rosenfeld has been employed at *The Washington Post* since 1966. His current position is Assistant Managing Editor for Outlook and Book World. In October 1973, he was the Metropolitan Editor at the *Post*. Rosenfield Affidavit ¶ 1.

157. Prior to his employment at the *Post*, Rosenfeld was employed for approximately 12 years at the *New York Herald Tribune*. Rosenfeld spent approximately 5 years as Foreign Editor of the *Herald Tribune*. Rosenfeld Affidavit ¶ 2.

158. Prior to its publication, Rosenfeld reviewed the content of the October 25th article with Ronald Kessler, the reporter who researched and wrote the article. Rosenfeld discussed with Kessler the sources of the information contained in the article, and satisfied himself that the sources for the article were sound. Rosenfeld Affidavit ¶ 4.

159. Kessler told Rosenfeld that he had read the court file in the civil case that is discussed in the article, and showed Rosenfeld copies of some of the documents upon which the story was based. Specifically, Kessler showed Rosenfeld the deposition that was the source of the information contained in the lead sentence of the article,

and Rosenfeld read that deposition prior to approving the article. Rosenfeld Affidavit ¶ 5.

160. Rosenfeld discussed with Kessler his attempt to contact Rebozo and his telephone conversation with Mr. Rebozo's attorney, Alan G. Greer, Esquire. *See* ¶¶ 152-153, *supra*. Rosenfeld Affidavit ¶ 6.

161. Mr. Greer's letter of October 4, 1973 to Mr. Kessler (Exhibit H, ¶ 154, *supra*) was referred, together with a draft of the story, to the *Post*'s counsel, Joseph A. Califano Jr. Esquire, of the law firm of Williams, Connolly & Califano. On October 15, 1973, Mr. Califano sent a letter to Mr. Greer, responding on behalf of the *Post* to Mr. Greer's letter of October 4. Exhibit I. *See* Rosenfeld Affidavit ¶ 7.

162. Prior to its publication, the *Post* article was reviewed by Mr. Califano. Rosenfeld discussed the article with Mr. Califano, and they were satisfied that the information in the article was fully supported and fairly presented. Rosenfeld Affidavit ¶ 8; Exhibit J.

163. At no time did either the author or the editor of the *Post* article, Mr. Kessler or Mr. Rosenfeld, become aware of any information that led him to believe that Mr. Riley's testimony was false or probably false. Nor did either Mr. Kessler or Mr. Rosenfeld at any time become aware of any information that led him to believe that any statement contained in the article was false or probably false. Kessler Affidavit ¶ 17-18; Rosenfeld Affidavit ¶ 9.

164. Neither Mr. Kessler nor Mr. Rosenfeld bear any ill-will toward Mr. Rebozo. The October 25th article in the *Post* was the result of a good faith effort on their part to present a fair and accurate account of a matter of public interest. Kessler Affidavit ¶ 19; Rosenfeld Affidavit ¶ 10.

165. Mr. Kessler and Mr. Rosenfeld exercised due care in the preparation of the October 25th article. The research and presentation of the information contained in the article was consistent with standard journalistic practice in every respect. Affidavit of Roy M. Fisher.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Washington, D.C.
May 5, 1976.

Civil Action No. 73-1728-Civ-JE

CHARLES G. REBOZO,
Plaintiff(s)

v.

THE WASHINGTON POST CO.,
Defendant(s)

DEPOSITION OF RONALD KESSLER

* * * *

BY MR. GREER:

Q I'm sorry. I lost your place. But, before you get to it, these are your notes; is that correct, sir?

A That's right.

Q All right, sir, you are referring to page 45; is that correct?

A Yes.

Q Would you read for us what your notes reflect in reference to the conversation with Mr. Riley?

A On the summary of Mr. Riley's deposition in the court case I wrote a telephone number, which I believe is his and "Declines to discuss case."

Q Other than that, can you remember what was said by you to Mr. Riley and what Mr. Riley said to you?

A Yes. Essentially, I called him to get any further comments he might want to make in connection with the deposition, but more importantly, I wanted to make sure he understood the significance of his testimony because in the deposition there was no reference to the fact that the extra three hundred shares of stock in question were

sold by Mr. Rebozo after Mr. Riley says that he told Mr. Rebozo that the stock was stolen. I wanted, somehow, to get a feeling from him, at least as to whether he understood the possible significance of his testimony.

Q Did you specifically ask him that fact?

A I specifically mentioned that fact, yes.

Q What did he respond?

A He did not say yes or no verbally. But, he gave me some indication that I interpreted to mean that he did understand the significance.

Q How did he give you that indication that you interpreted?

A I don't recall precisely, but it was something in the nature of a noise or grunt or some change in the tone of his voice.

Q Based on that response you made an interpretation?

A That's right.

Q Did you specifically ask him whether his statement in the deposition concerning his conversation with Mr. Rebozo was accurate?

A No.

Q Why not?

A I attach great significance to testimony given under oath and most newspaper articles, of course, are based on statements that are not made under oath. So, when a reporter obtains statements that are made under oath, it is certainly of more significance than otherwise.

Q It would have been significant, wouldn't it Mr. Kessler, if Mr. Riley told you he had made an error or a misstatement in his sworn testimony?

A Yes.

Q You didn't think it important to find out whether he would say whether he was right or wrong in that statement?

A No.

Q You didn't want to know what he wanted to say on that issue?

MR. CONNOLLY: That isn't at all accurate. Your attempt to characterize his testimony is incorrect. I will correct you, sir.

THE WITNESS: On the contrary. The precise reason I called Mr. Riley was to double check to make sure there had been no change since he gave his deposition, which would include a decision on his part that his testimony was not accurate.

BY MR. GREER:

Q Why didn't you ask him whether his testimony was accurate or not?

A It wasn't necessary to specifically ask that. By calling him and making it known to him that I intended to use his testimony in a story, and also trying to emphasize to him the significance of his testimony or the significance that I attached to it, I intended to bring out from him any additional comments that might be relevant.

Q Did you read the relevant testimony to him over the phone?

A No.

Q Well, how was he to know what testimony you were referring to and relying on?

A I made it clear that I was referring to the testimony that he had given in this particular court case and specifically referred to—although I didn't quote from it verbatim.—I referred to his testimony that he said; that he alleges that the stock was stolen and I also specifically pointed out to him what that would mean: That Mr. Riley made this statement before Mr. Rebozo subsequently cashed that same stock.

Q Yet, you expected him to remember what he had said a little less than two years before your telephone conversation?

A Yes.

Q Did you ask him if he had a copy of the testimony in front of him?

A No.

Q Do you know if he had a copy of the deposition?

A I don't know.

Q Do you know if he had ever read the deposition after he gave it?

A I don't know.

Q Do you recall speaking with me on the telephone saying this?

A I do.

Q Do you recall receiving a letter from me?

A I do.

Q And, do you recall receiving a telegram from me after the story was published?

A I do.

Q After any one of those contacts, did you ever call Mr. Riley when you were told that Mr. Riley was not telling the truth and ask him whether he was telling the truth or not?

A I did not.

Q Why not, sir?

A Because I had his statement under oath, and I had informed him that I intended to use that statement in a newspaper story and he had informed me that he didn't want to discuss the case any further. I also made it clear that I wanted to know if there was anything new or additional that he wanted to add, and obviously, if he wanted to change his testimony he could have called me.

Q But, you didn't point out to him what his testimony was?

MR. CONNOLLY: That's inaccurate. He said he did. He explained the significance of the testimony.

BY MR. GREER:

Q Did you specifically tell Mr. Riley what his testimony was?

A Yes.

Q Did you read it to him?

A No.

Q And, Mr. Riley declined to discuss the matter with you; is that correct?

A That's right.

Q In the normal practice of the newspaper reporter, isn't that something less than a confirmation?

MR. CONNOLLY: Don't answer the question. We are not talking about the normal practice of a newspaper reporter, but whether the story was written recklessly or with disregard of the truth.

MR. GREER: Is it your position that the normal practice of a newspaper reporter has nothing to do with your own criteria of recklessness?

MR. CONNOLLY: That is right.

MR. GREER: Certify the question.

BY MR. GREER:

Q Did you personally consider that Mr. Riley's declining to discuss the testimony of the deposition with you was something less than a confirmation of the facts contained in that deposition or alleged facts contained in that deposition?

A Did I consider his lack of comments to me to be a confirmation of his testimony?

Q Did you consider his declining to discuss the case to be something less than a confirmation of the facts contained in his deposition?

A He certainly did not confirm the facts in his deposition.

MR. CONNOLLY: And the article points out that he didn't.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 70-619-Civ-JLK

FIDELITY AND CASUALTY COMPANY OF NEW YORK,
Plaintiff,

vs.

THE KEY BISCAYNE BANK,
Defendant/Third-Party Plaintiff,

vs.

CHARLES L. LEWIS, *et al.*,
Third-Party Defendants.

66 West Flagler Street,
Miami, Florida,
Monday, 9:45 a.m.,
October 11, 1971.

DEPOSITION OF GEORGE H. RILEY, JR.

taken on behalf of the defendant/third-party plaintiff pursuant to stipulation of counsel

APPEARANCES:

BLACKWELL, WALKER & GRAY, by
JOHN KELLEY, Esq., of counsel,
Attorneys for Plaintiff.

FRATES, FLOYD, PEARSON & STEWART, by
ALAN G. GREER, Esq., of counsel,
Attorneys for Defendant/Third-Party Plaintiff.

HIGH, STACK, DAVIS & LAZENBY, by
LEONARD KLATT, Esq., of counsel,
Attorneys for Third-Party Defendant
Charles L. Lewis.

[Stipulations deleted]

Thereupon:

GEORGE H. RILEY, JR.

was called as a witness and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GREER:

Q Please state your full name, sir.

A George H. Riley, Jr.

Q Where do you reside, Mr. Riley?

A 3413 West Lake Place, Miramar, Florida.

Q Where are you presently employed?

A Underwriters Adjusting Company, 269 Giralda Avenue, Coral Gables, Florida.

Q In what capacity, sir?

A Manager.

Q How long have you been with the Underwriters Company?

A Seventeen years on October—I mean November 8 of this year.

Q In your capacity of your present employment, are you called upon to represent the Fidelity and Casualty Company of New York?

A Yes.

Q What capacity does that representation take?

A Manager.

Q Are you manager in the sense that you sell insurance? What type of managerial function do you perform?

A I am the manager of Underwriters Adjusting Company.

Q I am hazy in my own mind as to what the relationship is between that company and the Fidelity and Casualty Company.

A Underwriters Adjusting Company is a wholly-owned subsidiary corporation of the Continental Corporation. The Fidelity and Casualty Company is a wholly-owned corporation owned by the Continental Corp.

Q What specific functions does your company perform for the Continental group?

A We provide total claim service.

Q Were you in any way involved in or connected with a claim presently being made by the Fidelity and Casualty Company in relation to 900 shares of IBM stock, the numbers of which are IBM Certificate Nos. AE006614 through AE006622, which were presented in the summer of 1968 to The Key Biscayne Bank as collateral on a loan?

MR. KELLEY: Excuse me.

Mr. Riley, as you know from your motion for production with the Court, made a memorandum concerning whatever stocks he investigated. I did not know whether you would want him to refer to that at this time.

I will ask him if he needs to refer to it.

A In answer to the first part of the question, I'll say yes, I was involved in a limited investigation in this claim.

But I cannot testify as to the numbers involved or the correctness of the numbers you gave without reference to my memorandum.

Q Do you have your memorandum here with you at this time?

MR. KELLEY: I have a copy.

Q Would you refresh your memory from that memorandum and see if you can confirm from the memorandum the stock certificate numbers to which we have just been referring.

A The stock certificate numbers as given me by Mr. Rebozo were nine certificates of 100 shares each; Nos. AE00614 through AE00622, inclusive.

Q When was the first time—by "time," I mean point in time; physical date—you were contacted by either your company or the Fidelity and Casualty Company in reference to these particular stock certificates?

A It was approximately mid-October, 1968.

Q What was the nature of that contact, if you, recall, sir?

A I was asked to contact Key Biscayne Bank to determine if stock which had been stolen from our insured's vault was pledged as collateral for a loan at The Key Biscayne Bank.

Q When was the first date upon which you made any sort of contact with Key Biscayne Bank in reference to this inquiry?

A Could I refer to my memorandum?

Q Please do, sir.

A It was—I do not have the exact date. However, it was one or two days prior to October 14, 1968.

Q One or two days prior to the 14th?

A Yes, sir.

Q Of what did that contact consist?

A It consisted of me getting in my car, driving to Key Biscayne Bank, and seeking out the individual at the bank with whom to speak.

Q To whom did you speak on that first occasion?

A The first time I spoke with a Mr. Stearns who was the loan officer or who was identified to me as the loan officer.

Q Of what did your conversation with Mr. Stearns consist, if you recall?

A I advised that I represented the bonding company for E. F. Hutton & Co. and that I was there to investigate some stolen stock certificates.

Q Did you identify those certificates?

A I did not identify any certificates to Mr. Stearns. I did not become involved in the discussion of this at all with him.

Q Specifically, when I talked about identification, did you tell him the general nature of the stock; that it was IBM stock?

A I don't recall the full extent of the conversation with Mr. Stearns, other than that he said that he was not the proper party to speak with about anything and that I'd have to come back.

Q Did he indicate whom the proper party was?

A He said that the only party that could assist me would be Mr. Rebozo.

Q Did you later in fact speak with Mr. Rebozo?

A After many attempts or several attempts.

Q What were the dates and nature of these attempts, please?

A Well, there was an appointment made for the 14th, which was not kept by Mr. Rebozo. There was another appointment made for the 17th, which was not kept by Mr. Rebozo.

But I did talk with him on the 22nd of October 1968.

Q Were there any reasons given for his not keeping the 14th and 17th appointments?

By "he," I am referring to Mr. Rebozo.

A On at least one occasion his secretary stated that he was busy, and it was during the time of the Nixon campaign and this was the excuse; that he was too busy to see me.

Q Where did the meeting on the 22nd of October take place?

A In the conference room of The Key Biscayne Bank.

Q Who was present at that meeting, if you recall?

A Myself and Mr. Rebozo were the only people.

Q What transpired at that meeting, if you recall?

A I advised that I represented the bonding company for E. F. Hutton & Co. and that I wanted to discuss

IBM stock which had been pledged as collateral for a loan which was made by The Key Biscayne Bank.

Q At the time of this conference you knew that the stock had been pledged; is that correct?

A I was told that the stock had been pledged.

Q Who informed you that the stock had been pledged?

A Mr. Condon.

Q Mr. Condon is your superior?

A Mr. Condon works in our New York office.

Q Do you recall exactly what Mr. Condon told you about the stock?

A That it was missing from the vault of E. F. Hutton & Co.; and that nine 100-share certificates had been pledged for a loan—pledged as collateral for a loan—at The Key Biscayne Bank.

Q Did he tell you who had pledged this stock as collateral?

A I do not recall.

Q Going back to your conversation with Mr. Rebozo, as I understand your earlier testimony you informed Mr. Rebozo that you were interested in 900 shares of IBM stock; is that correct?

A That's correct.

Q Would you continue with what transpired from that point.

A I merely asked that I would like to verify the serial numbers of the stock which had been pledged and that I wanted some information concerning the loan, et cetera.

Q Did Mr. Rebozo give the information that you requested?

A He stated that I should get my information from Mr. Clink Scales of the FBI to whom he had given this information approximately ten days prior.

Q Did you see any of the bank records at that time?

A No. I did not see any of the bank records.

Mr. Rebozo did produce the numbers of the stock certificates and this was the only thing. He did not produce any file.

Q Did you tell Mr. Rebozo at that time that the stock had been stolen or was missing from E. F. Hutton & Co.?

A Yes, sir.

Q Can you recall exactly what you told him?

A As I previously stated, I advised Mr. Rebozo that I was investigating the theft of nine 100-share certificates from the vaults of E. F. Hutton & Co. in New York.

Q Did you advise him of the numbers of the certificates that you were investigating?

A Yes. And the numbers corresponded to the numbers he gave me.

Q Did you then talk with the FBI?

A No, sir, I did not talk with the FBI.

Q Did you have any further contact with The Key Biscayne Bank?

A None other than the meeting on October 22.

Q So, as I understand it, the meeting on the 22nd was your only real meeting with the bank other than to go over there and make an appointment?

A That was my only real meeting with the bank.

Q Did you make any sort of a written memoranda or report of your meeting with the bank?

A I went straight back to the office and dictated my report to my company.

Q Do you have a copy of that report here with you today?

A Yes.

Q May I see it, please?

A [Witness complies]

MR. KELLEY: Note that this is being produced pursuant to the pleadings filed by the defendant, Key Biscayne Bank.

MR. GREER: I would like this marked as Defendart Key Biscayne Bank's Exhibit 1.

[The document referred to was marked for identification as Defendant Key Biscayne Bank's Exhibit No. 1.]

Q Sir, you have produced what has now been marked as Defendant Key Biscayne Bank's Exhibit No. 1, consisting of two typewritten pages and one handwritten page.

In looking at that, sir, at the first two typewritten pages, is that the dictated report to which you earlier referred in your testimony?

A Yes, it is the dictated report that I personally dictated.

Q Was the copy of the handwritten page which is attached to the back written by you or—

A It was not. It was addressed to me.

Q Who wrote that report?

A One of my ex-employees by the name of Larry Edmonds.

Q Do you know where Mr. Edmonds lives at this time?

A I have no earthly idea.

Q Do you know where he is employed?

A I have no earthly idea.

Q Would your company, to your knowledge, have any information concerning either his present address or employment?

A No, sir.

Q Sir, in your memorandum there is a certain amount of factual detail relating to the loan which was given by The Key Biscayne Bank to one Charles L. Lewis.

Did you obtain this detailed information from Mr. Rebozo?

A This information was obtained by—from Mr. Rebozo and I wrote it as he said.

Q So he, in fact, gave you this information at the time of your October 22 interview?

A He gave me the information, yes.

Q Does this memorandum accurately reflect, to the best of your knowledge, what transpired at your October 22 meeting and the contacts leading up to that meeting?

A It does.

MR. GREER: I have no further questions.

CROSS EXAMINATION

BY MR. KLATT:

Q May I see the exhibit, please.

A [Witness complies]

Q Mr. Riley, did Mr. Condon indicate to you where he had received his information as to the possibility of the missing stock being pledged at Key Biscayne Bank when he first contacted you?

A If he did I don't recall.

Q Did Mr. Rebozo, at the time of your meeting, indicate the physical location of the shares of stock in question?

A At the time of my meeting with Mr. Rebozo on October 22, 1968, he stated that the stock had been sold and the loan had been paid off.

Q In other words, he did not know the physical location of the shares of stock at that time?

A I can only say that he said the stock had been sold at my meeting date and that the loan had been paid off.

Q In your typewritten report here it states that you did not believe Mr. Rebozo was giving you all the information available at the time; and also that he would not give you access to his file.

Do you recall any possible reasons he may have given you for not letting you look at the file?

A I can say that Mr. Rebozo didn't even want to give me the time of day, let alone get his file.

As I indicated, he told me to contact Mr. Clink Scales with the FBI to get my information.

I was persistent and was able to get the information which is contained in my report.

Q Did you thereafter contact Mr. Clink Scales of the FBI?

A No, sir, I did not.

Q Did any employee under you contact Mr. Clink Scales?

A Not to my knowledge after October 22.

Q Did you or any employee under your supervision contact Mr. Clink Scales prior to October 22?

A Yes.

Q Can you tell me the result of such contact?

A The contact was made by Mr. Larry Edmonds, but I cannot testify as to the information he obtained. I think you will find it in the Exhibit 1.

Q You are referring to the handwritten page?

A I am.

MR. KLATT: I have no further questions.

MR. KELLEY: No questions.

[Thereupon, the witness waived the reading and signing of the deposition and the taking of the deposition was concluded at 10:10 a.m.]

Opposition

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NO. 81-173

in the

Supreme Court

of the

United States

OCTOBER TERM, 1981

THE WASHINGTON POST COMPANY,
Petitioner,

vs.

CHARLES G. REBOZO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Charles G. Rebozo files this, his Brief in Opposition to Petition For a Writ of Certiorari filed by Petitioner Washington Post.

STATEMENT OF THE CASE

Respondent Charles G. Rebozo (hereinafter Respondent Rebozo) takes one principal exception to Petitioner's "Statement Of The Case" in its Petition at page 2. Contrary to Petitioner's assertion, Respondent Rebozo never conceded in the district court below that the investigator, Mr. Riley, testified that he told Mr. Rebozo the stock in question was stolen.

Rather, Respondent Rebozo took the adamant position below that the investigator never made any such allegation in his deposition. Respondent's position was that such an allegation was the Petitioner Washington Post's interpretation of the investigator's deposition. Thus, Petitioner's "Statement Of The Case" is clearly erroneous.

Respondent's actual position below was that the article was false in many respects. Among them were that:

(1) The investigator never alleged in his deposition that he told Respondent Rebozo the stock was stolen. Such an allegation was the Petitioner's interpretation of the subject deposition.

(2) Any fair reading of the deposition and the remainder of the court file involved would clearly demonstrate that any such interpretation of the investigator's deposition was erroneous and impossible to believe.

(3) The subject stock was sold or "cashed" by the bank and not by Respondent Rebozo personally as alleged by the Petitioner's article.

STATEMENT OF THE FACTS

Throughout its Petition, the Washington Post ingeniously attempts to reverse the Court's standard for review of the facts in a summary judgment setting. Petitioner does this by viewing and reciting the facts in the light most favorable to Petitioner.

However, the true standard is that the facts must be viewed in the light most favorable to Respondent Rebozo. Those facts which demonstrate actual malice or its potential in Petitioner's actions are as follows:

The Petitioner Washington Post on October 25, 1973 printed an article which bluntly and plainly accused Respondent Rebozo of knowingly and intentionally selling stolen securities. [Printed Appendix filed with United States Fifth Circuit Court of Appeals below at pp. 10-12.] The story was not "hot news" because it related to facts occurring in 1968 and was printed in 1973. Thus, Petitioner had ample time to research the story and confirm its accuracy if Petitioner wanted to do so.

Respondent Rebozo, a banker, was not a newsworthy person in and of himself, nor was he seeking to affect any public issue. Rather, he was newsworthy because he was the close personal friend of then President Nixon. Had the story in question been about any other bank president from Boon Docks, U.S.A., it would have had no interest for the Petitioner.

However, at the time of the subject story, the Petitioner Washington Post was in the middle of its

Watergate coverage of President Nixon. It was looking into the President's personal finances and Respondent Rebozo was the President's banker as well as his friend. The story here in question had nothing to do with the President or his finances, but the Petitioner printed it anyway.

Petitioner's reporter, Mr. Kessler, testified at his deposition that:

> Q. Would the story be of any interest to you as a Washington Post reporter if Mr. Rebozo had not been a friend of Mr. Nixon?
>
> A. The same precise story?
>
> Q. Yes sir.
>
> A. If he had nothing to do with Nixon?
>
> Q. That is right. If he had been a joe from Boon Docks, U.S.A.
>
> A. Not as the story is written, no.
>
> * * *
>
> Q. I am now asking if your interest in Mr. Rebozo was based on the fact that Mr. Rebozo was a personal and financial friend of Mr. Nixon?
>
> A. That's Right.

(Kessler deposition, May 5, 1976, pp. 138, 140-141.)

A. Investigator Riley's Deposition

The key deposition testimony relied on by Petitioner Washington Post to prove its allegation that Mr. Rebozo knowingly sold stolen securities is found in the deposition of Mr. Riley, an investigator for an insurance company. Mr. Riley is alleged by Petitioner to have told Respondent Rebozo in a private conversation that the subject stock was stolen. Relative to the alleged statement made by investigator Riley to Mr. Rebozo, the deposition must be viewed in light of the fact that only the two of them were present at the conversation. No one else can corroborate or refute what was said.

In that light, what did Mr. Riley actually testify on deposition that he told Respondent Rebozo? One word that he never used in that deposition in relation to his conversation with Mr. Rebozo is the word "stolen." No where in that deposition does Mr. Riley say he told Respondent Rebozo the subject stock was "stolen". (A. 39-55) In fact, the Petitioner Washington Post in its Reply to Appellant/Respondent's Response To Petition For Panel Rehearing in the United States Fifth Circuit Court of Appeals below admits that the use of the word "stolen" relative to that conversation is its, the Petitioner Washington Post's, *"characterization"* of the subject testimony. (Appellee's Response to Reply to Petition for Panel Rehearing p. 2)

After reporter Kessler read the Court file and made his now admitted "characterization" of Mr. Riley's deposition he contacted Mr. Riley. Despite the fact that Mr. Kessler had to interpret the subject deposition in order to conclude that Mr. Riley told Mr. Rebozo the stock was stolen, Mr. Kessler carefully never asked

Mr. Riley to confirm that he, Riley, had in fact told Mr. Rebozo the subject stock was stolen. In fact when questioned on this issue, Mr. Kessler testified:

Q. Did you specifically ask him whether his statement in the deposition concerning his conversation with Mr. Rebozo was accurate?

A. No.

Q. Why not?

A. I attach great significance to testimony given under oath and most newspaper articles, of course, are based on statements that are not made under oath. So, when a reporter obtains statements that are made under oath, it is certainly of more significance than otherwise.

Q. It would have been significant, wouldn't it Mr. Kessler, if Mr. Riley told you he had made an error or a misstatement in his sworn testimony?

A. Yes.

Q. You didn't think it important to find out whether he would say whether he was right or wrong in that statement?

A. No.

Q. You didn't want to know what he wanted to say on that issue?

[Objection omitted.]

(Kessler deposition, May 5, 1976, p. 54)

This is extremely important in light of what is actually contained in the subject deposition.

The actual words that Mr. Riley used in his deposition relative to his conversation with Respondent Rebozo were as follows:

Q. Where did the meeting on the 22nd of October take place?

A. In the conference room of the Key Biscayne Bank.

Q. Who was present at that meeting if you recall?

A. Myself and Mr. Rebozo were the only people.

Q. What transpired at that meeting, if you recall?

A. I advised that I represented the bonding company for E. F. Hutton & Co. and that I wanted to discuss IBM stock which had been pledged as collateral for a loan which was made by the Key Biscayne Bank.

Q. At the time of this conference you knew that the stock had been pledged is that correct?

A. I was told that the stock had been pledged.

Q. Who informed you that the stock had been pledged?

A. Mr. Condon.

Q. Mr. Condon is your superior?

A. Mr. Condon works in our New York Office.

Q. Do you recall exactly what Mr. Condon told you about the stock.

A. That it was *missing* from the vault of E. F. Hutton & Co.; and that nine 100 share certificates had been pledged for a loan— pledged as collateral for a loan— at The Key Biscayne Bank.

* * *

Q. Did you tell Mr. Rebozo at that time that the stock had been *stolen or was missing* from E. F. Hutton & Co.?

A. Yes sir.

Q. Can you recall exactly what you told him?

A. As I previously stated, I advised Mr. Rebozo that I was investigating the theft of nine 100-share certificates from the vaults of E. F. Hutton & Co. in New York.

(emphasis added) (A. 46-48)

From the foregoing it is clear that the investigator, Mr. Riley only knew at the time of his conversation with Mr. Rebozo in October 1968 that the subject stock was *missing* from E. F. Hutton's vaults, not that it had actually been stolen.

Mr. Riley testified at his deposition that immediately after his conversation with Respondent Rebozo he, Mr. Riley, wrote a memorandum report of the meeting. (A. 56-59) That memorandum report was attached as an exhibit to Mr. Riley's deposition. It is entitled "Subject IBM Stock *Shortage* from E.F. Hutton & Company". (emphasis added) (A. 56-59) Nowhere in that memorandum does Mr. Riley use the words "stolen" or "theft". Rather, he uses the word "shortage". Had he told Mr. Rebozo that the stock was in fact stolen surely such an important fact would be noted in the report written immediately after the conversation. It is not noted because, in fact, at the time of the meeting Mr. Riley could not have known that the stock had been stolen. As is more fully pointed out below, his employer and E. F. Hutton did not know that fact as of the time of the conversation.

It must be noted that Mr. Riley's meeting with Respondent Rebozo occurred on October 22, 1968. Mr. Riley's deposition was taken on October 11, 1971, almost exactly three years later. By the time of the deposition

everyone was aware that the stock in question had been stolen. Thus, it would have been easy for Mr. Riley to, after the fact, inadvertently use the word stolen as he did in relation to the stock in contexts other than relative to his conversation with Mr. Rebozo. This is especially true in light of the fact that his employer was suing the Key Biscayne Bank for conversion of that stock in the case of *Fidelity & Casualty Co. v. Key Biscayne Bank* and the subject deposition was being taken as part of that suit.

However, as pointed out above, any reading of the court file in the *Fidelity & Casualty Co.* case clearly demonstrated that neither Mr. Riley, his employer Fidelity and Casualty Co. of New York nor E. F. Hutton knew at the time of Mr. Riley's conversation with Mr. Rebozo that the subject stock was stolen. They only knew that there was a stock "shortage" and that the subject stock was "missing" from E. F. Hutton's vaults. After a review of the same court file that Mr. Kessler, Petitioner's reporter, had reviewed, the United States Fifth Circuit Court of Appeals in its opinion in *Fidelity & Casualty Co. v. Key Biscayne Bank*, 501 F.2d 1322 (5th Cir. 1974), stated the facts of that case to be as follows:

> At sometime during the period of May 1, 1968, and July 26, 1968, a block of certificates for 5000 shares of stock in International Business Machines Corp. (IBM) *disappeared* from the vaults of appellant E.F. Hutton & Co. (Hutton). Their *disappearance* became known through an audit of Hutton by Haskins & Sells commenced on July 26 and completed on August 15, 1968. Hutton became aware of the possible theft of the stock certificates on September

13, 1968, at which time it notified the New York City Police, the Federal Bureau of Investigation, and its surety, appellant Fidelity & Casualty. A special audit by Haskins & Sells, commenced in October, 1968 and completed in December, 1968, produced the serial numbers of the missing stock certificates.

Prior to that time the third party defendant Charles L. Lewis appeared at the office of the appellee Bank in Key Biscayne, Florida on July 30, 1968, seeking a $195,000 loan, assertedly for the purpose of acquiring an interest in a Florida airline. Lewis offered nine certificates each representing 100 shares of IBM stock as collateral. Each certificate was in the "street name" of E.F. Hutton & Co. and endorsed in blank by Hutton. . .

On July 31, the Bank's officers checked with IBM by telephone regarding its registration of the certificates. IBM reported that the stock was listed in the name of Hutton. Hutton was telephoned and advised that there was no stops or holds in effect as to the stock. IBM upon request transferred the registration of the stock to the name of Lewis and issued new certificates in Lewis' name. The Bank granted the loan to Mr. Lewis and retained the nine stock certificates, whose market value was about $338,000, as collateral.

On September 23, 1968, Hutton issued notice to public and financial institutions that it was *missing* approximately 10,000 shares of IBM

> stock. Because of the prior transfer in registration of the 900 shares here involved from Hutton's name into Lewis', the notice did not include these 900 shares.
>
> In October, 1968, the appellee Bank gave notice to Lewis that it intended to call his loan. In response, the Bank received instructions from Lewis to sell the 900 shares to satisfy the debt and to credit Lewis' account with whatever excess remained from the sale of stock. The Bank, in compliance with these instructions, sold the shares in two blocks, 600 shares on October 17 for approximately $196,000, and the remaining 300 shares on November 13, for an amount not appearing in the record. The excess over the amount outstanding on the loan was credited to Lewis' account.
>
> *It was not until December 5, 1968, however, that Hutton learned that the 900 shares here involved were among those that had been missing from its vault prior to July 26. Hutton notified its insurer, Fidelity & Casualty of the loss and this suit ultimately resulted.*

Id. at 1323-1324. (emphasis added)

Based on Petitioner's review of the court file, this information was equally available to the Petitioner Washington Post and its reporter Mr. Kessler as it was to the Fifth Circuit. When Respondent Rebozo's lawyer learned of the pendency of the article in question he wrote to *The Washington Post* and reporter Kessler pointing out the impossibility of Mr. Riley's testimony.

The letter further demanded that they review the court file so that they could assertain that fact. Mr. Kessler, however, refused to re-review the court file and, in fact, did not do so. (Kessler Deposition dated November 7, 1977, p. 184). Rather, he classified the letter from Mr. Rebozo's attorney, which directed him to review the other documents in the court file, as "a lot of crap". (A. 62-63)

B. Portrayal of Stock Sale as Mr. Rebozo's Personal Acts

The Petitioner's article on Mr. Rebozo portrays the entire stock transaction as a personal one conducted by Respondent Rebozo. This was a conscious and intentional decision on the part of Petitioner. This is evidenced by a memorandum from reporter Kessler to his editors at *The Washington Post*. In it he states:

> I'd like to review with you and our lawyers one issue in the Rebozo story. The issue was raised by Rebozo's lawyer in a recent telephone call and letter prompted by my request for comment. He claimed that the $91,500 in stolen IBM stock was cashed not by Rebozo but by "the bank."
>
> If this were true, our lead would have to say that *Rebozo's bank* cashed the stock after Rebozo was told that it was stolen, rather than that *Rebozo* cashed it after he was told it was stolen.
>
> * * *
>
> So who cashed the stock? Neither Rebozo nor other witnesses were asked this question in

the depositions. There are no other legal papers in the court file to answer the question.

But there are copies of the bills, receipts and checks covering the sale transaction. As is clear from the attached, they all bear Rebozo's name.[1]

* * *

The fact that Rebozo's name appears on them, and that the transactions were executed on his personal account[2] appear to me to be more than sufficient evidence for the purpose of an accurate and fair newspaper account of what appears in the court file that Rebozo technically and substantively cashed the stock.

(A. 60-61) (emphasis added)

The Petitioner has attempted to take the position below that its article, despite the above memo, portrays the subject transaction as a bank transaction and not that of Mr. Rebozo individually. However, any reading of the article clearly demonstrates that it portrays the stock transactions as those of Mr. Rebozo and not of the bank. For example the article's headlines read:

---

[1]See Walston & Co. receipts [pgs. 168-171 printed Appendix filed with United States Fifth Circuit Court of Appeals below] — which all bear notation "Key Biscayne Bank attn: Charles G. Rebozo, Pres."

[2]Petitioner Washington Post admits in its Petition on page 18 note 9 that the reference to Mr. Rebozo's "personal account" is erroneous.

BEBE REBOZO SAID TO CASH STOLEN STOCK (lead headline)

STOCK ALLEGEDLY[3] STOLEN BY THE MAFIA CASHED BY REBOZO (headline on second page of article)

REBOZO DENIES KNOWING STOCK HE CASHED WAS STOLEN (headline on third page of article).

The article itself states:

> Rebozo's lawyer, Greer, said in a telephone interview that the stock was sold by "the bank" not by Rebozo. However, the court file shows that the slip confirming the sale, the receipt for the securities, and the check with proceeds of the sale were all marked to the attention of Rebozo.[4]

(Printed Appendix filed with United States Fifth Circuit Court of Appeal p. 11.)

Thus, there can be no question that the subject article portrays the sale of the stock as being personal actions of Respondent Rebozo rather than those of the bank.

---

[3]The word "allegedly" was dropped from Petitioner's late city edition [Russell deposition p. 14 Ex. 2]

[4]See Walston & Co. receipts and check [pgs. 168-171 printed Appendix filed with United States Fifth Circuit Court of Appeals below]—which all bear notation "Key Biscayne Bank attn: Charles G. Rebozo, Pres."

The facts, however, demonstrate that the sale of the stock and all of the other transactions surrounding the loan and the stock were those of the bank and not the personal ones of Mr. Rebozo. The Petitioner admits that at page 18 of its Petition.

REASONS WHY THE WRIT SHOULD BE DENIED

THE FACTS OF THE CASE CLEARLY GIVE RISE TO A JURY ISSUE AS TO WHETHER THE PETITIONER ACTED WITH "ACTUAL MALICE" TOWARDS RESPONDENT REBOZO IN PUBLISHING THE SUBJECT ARTICLE.

The standards for granting a defendant's motion for summary judgment in a libel situation are presently clear and need no review by ways of Writ of Certiorari from this Court. Those are that the facts and the record must be viewed in the light most favorable to the plaintiff. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 162 n. 5, 99 S.Ct. 2701, 2705 n. 5, 61 L.Ed.2d 450 (1979); *Time, Inc. v. Ragano*, 427 F.2d 219, 221 (5th Cir. 1970).

In light of the trial court's determination and the Fifth Circuit Court of Appeals' affirmance that Respondent Rebozo is a public figure,[5] the only possible remaining issue is whether or not the Fifth Circuit correctly found that there were facts present in the case sufficient to create an issue to be determined by the jury as to

[5]The issue of whether or not Mr. Rebozo is a public figure for the purposes of this case is addressed in Respondent's Cross-Petition for Writ of Certiorari.

whether or not the Petitioner Washington Post had acted with "actual malice" in publishing the subject article. As found by the appeals court below and as outlined above, the facts of this case "when taken in a light most favorable to Rebozo, could amount to evidence of the reporter's reckless disregard for the truth . . .", that is to say one of actual malice on Petitioner's part. *Rebozo v. Washington Post Company*, 637 F.2d 375, 382 (5th Cir. 1981).

In reviewing the issue of what constitutes a showing of "actual malice" this Court has held that publication with knowledge of falsity, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); with reckless disregard of whether the statement was false or not, *New York Times Co. v. Sullivan*, *supra*; or with serious doubts as to the truth of the publication, *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), all constitute a sufficient showing to meet the actual malice test.

As pointed out by this Court in *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), all of the above showings require an inquiry into the state of mind of the defendant which state of mind must in most cases be determined based on subjective evidence.

This leads inescapably to the conclusion that "[p]roof of such a mental state must usually be inferred from circumstances difficult to develop on motion for summary judgment." *Vandenberg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir.), *cert. denied*, 404 U.S. 864, 92 S.Ct. 49, 30 L.Ed.2d 108 (1971). In fact this Court has noted in relation to libel that "[t]he proof of 'actual malice' calls

a defendant's state of mind into question and does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n. 9, 99 S.Ct. 2675, 2680 n. 9, 61 L.Ed.2d 411 (1979) (citation omitted).

Within these parameters, it is clear that the evidence in the present case is more than sufficient to create a jury issue of actual malice.

An analysis of the facts in the case shows that the story in question was based on a conversation between two people, Respondent Rebozo and the investigator, Mr. Riley. As to that conversation, no one or nothing could prove that Mr. Riley actually told Mr. Rebozo the subject stock was stolen. Therefore, the Petitioner had to determine whether it believed Mr. Rebozo when he "flatly" denied the statement was made or whether it was satified with its, Petitioner's, own "characterization" of what Mr. Riley stated in his deposition since in that deposition Mr. Riley never uses the word "stolen" relative to his conversation with Mr. Rebozo. (A. 39-55)

A clear inference of reckless disregard of the truth on the part of Petitioner can be drawn from the facts of this case in light of the fact that Mr. Riley testified in the deposition that he was only told by his employer that the stock was "missing" from the vaults of E.F. Hutton. (A. 47-48) Such an inference of reckless disregard is enhanced by the facts that Mr. Riley's report, made immediately after his conversation with Mr. Rebozo, never mentions the words "stolen" or "theft," let alone the fact that he told Mr. Rebozo the subject stock was stolen. Rather, it indicates Mr. Riley was investigating a stock "shortage." (A. 56-59)

Given the foregoing facts, Petitioner's acts after reading the deposition further enhance the inference of Petitioner's willful attempts to remain ignorant of what actually occurred and its reckless disregard of the truth.

This is demonstrated by the fact that Petitioner's reporter, Mr. Kessler, having once read the deposition and having made his own characterization of it called Mr. Riley, the deponent, and carefully avoided asking him to confirm his, Mr. Kessler's, interpretation of that deposition. In his deposition, Mr. Kessler testified as follows:

> Q. Did you specifically ask whether his statement in the deposition concerning his conversation with Mr. Rebozo was accurate?
>
> A. No.
>
> Q. Why not?
>
> A. I attach great significance to testimony given under oath and most newspaper articles, of course, are based on statements that are not made under oath. So, when a reporter obtains statements that are made under oath, it is certainly of more significance than otherwise.
>
> Q. It would have been significant, wouldn't it Mr. Kessler, if Mr. Riley told you he had made an error or a misstatement in his sworn testimony?

A. Yes.

Q. You didn't think it important to find out whether he would say whether he was right or wrong in that statement?

A. No.

Q. You didn't want to know what he wanted to say on that issue?

[Objection omitted.]

Kessler deposition, May 5, 1976, p. 54.

Again, the actions of Mr. Kessler, Petitioner's reporter, give rise to a clear inference that the Petitioner and Mr. Kessler did not want to know anything that might change the tone or content of the story they wished to publish, let alone have the central alleged statement of the story refuted by the man who purportedly made it. If that is not enough of a showing by inference of the possibility of actual malice in a defendant's mental processes sufficient to avoid summary judgment, then the Court's statements on that issue in *Herbert v. Lando, supra*, and *Hutchinson v. Proxmire, supra*, can have no meaning.

Next, as found in the opinion of the United States Fifth Circuit Court of Appeals in *Fidelity & Casualty Co. v. Key Biscayne Bank, supra*, the employer of Mr. Riley and its insured E. F. Hutton did not know, at the time of Mr. Riley's visit to Mr. Rebozo, that the stock was stolen. They only knew that the stock was short or

missing. They did not determine the fact of actual theft until December 5, 1968, almost a month and a half after the alleged conversation. Therefore, it would have been physically impossible for Mr. Riley to tell Mr. Rebozo something he did not know. These facts are based on the court file in *Fidelity & Casualty Co. v. Key Biscayne Bank, supra.* That file was equally available to Mr. Kessler and Petitioner as it was to the Fifth Circuit. In fact, Mr. Kessler admits he read the file one time.

Respondent Rebozo's lawyer, by letter prior to publication, demanded that Petitioner and Mr. Kessler go back and re-review that file in order to demonstrate the falsity and, in fact, impossibility of the interpretation they were placing on Mr. Riley's deposition.

Mr. Kessler refused to go back to review that file again and never did so. Rather, he referred to Mr. Rebozo's lawyer's letter as a "lot of crap". (A. 62-63)

This is but another example from which Petitioner's reckless disregard of the truth and its conscious mental desire to remain ignorant of the truth can be inferred.

Finally, the internal memorandum from Mr. Kessler to his editors clearly demonstrated Petitioner's actual malice toward Respondent Rebozo. In that memorandum Mr. Kessler stated:

> I'd like to review with you and our lawyers one issue in the Rebozo story. The issue was raised by Rebozo's lawyer in a recent telephone call and letter prompted by my request for comment. He claimed that the $91,500 in stolen

> IBM stock was cashed not by Rebozo but by "the bank".
>
> If this were true, our lead would have to say that *Rebozo's bank* cashed the stock after Rebozo was told it was stolen, rather than that *Rebozo* cashed it after he was told it was stolen.

(A. 60-61) (emphasis added)

Thereafter, although the facts clearly showed and Petitioner now admits that the cashing of the stock were transactions of the bank, the article in question clearly portrayed the transactions as being Mr. Rebozo's personal acts.

This fact unquestionably demonstrates Petitioner's attempt to cast Respondent Rebozo in the worst possible light. It is exactly the type of evidence arising out of the editorial process which this Court found in *Herbert v. Lando, supra*, would be probative to demonstrate actual malice.

As is demonstrated above, Petitioner's entire course of conduct relative to the Rebozo story points directly to the fact that Petitioner was consciously and recklessly seeking to disregard the true facts of the case. Further, it is also clear that the Petitioner entertained serious doubts as to the truth of its own story. In summary, the facts show that:

1. The Petitioner and its reporter knew that there was no independent corroboration of the alleged fact that Mr. Rebozo was told the stock was stolen.

2. The Petitioner and its reporter knew that Mr. Rebozo denied that the alleged statements were ever made to Mr. Rebozo by the investigator.

3. The Petitioner and its reporter had to characterize the investigator's testimony in order to allege that he told Mr. Rebozo the stock was stolen since that investigator did not use the word "stolen" anywhere in his deposition relative to his conversation with Mr. Rebozo.

4. The Petitioner and its reporter carefully avoided confirming the investigator's alleged statements to Mr. Rebozo relative to stolen stock despite the fact that Petitioner's reporter personally spoke with the investigator.

5. The investigator had only been told by his employer that the stock was "missing" and he was investigating a "shortage" not a theft or stolen stock.

6. It was physically impossible for the investigator to have known the subject stock was stolen at the time of his October 1968 conversation with Mr. Rebozo since his employer and E.F. Hutton did not learn of that fact until December, 1968, over a month later. This fact was apparent from the court file which Petitioner and its reporter reviewed.

7. Petitioner and its reporter sought to ignore the facts in paragraph 6 above and refused to go back and review the court file when so requested by Mr. Rebozo's lawyer, referring to the lawyer's letter which contained the request as a "lot of crap."

8. The Petitioner and its reporter clearly portrayed the subject stock sale as being Respondent Rebozo's personal actions instead of actions of the bank. They now admit, however, that those actions were bank actions.

9. The Petitioner and its reporter in their own internal memorandum between reporter and editor admit that if the stock sale was a bank action, as they now agree it was, they would have to change their story's lead and say the bank and not Rebozo sold the stock. Although that was in fact the case, Petitioner never made the admittedly necessary change to its story.

10. The story in question was not "hot news." Rather, it involved actions which occurred almost three years prior to the date of publication. Therefore, there was no hurry or reason why Petitioner could not have fully and fairly investigated the subject story.

11. In fact, the Petitioner's only interest in the story was because Mr. Rebozo was the personal and financial friend of the then President Nixon. While the story had nothing to do with the President, Petitioner printed it as part of its continuing policy of opposing the President and as part of its Watergate coverage.

From the foregoing facts, a jury could unquestionably find that the Petitioner acted with "actual malice" as defined in *New York Times Co. v. Sullivan, supra*, and *St. Amant v. Thompson, supra*, that is to say with reckless disregard of the truth or with serious doubts as to the truth of its article.

The foregoing facts clearly raise a jury question as to the issue of Petitioner's state of mind in relation to the "actual malice" issue. Thus, the standards suggested in *Herbert v Lando, supra*, and in *Hutchinson v Proxmire, supra*, have clearly been met, and the decision of the court of appeals below is correct.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing were mailed this 27th day of August, 1981 to EDWARD BENNETT WILLIAMS, Williams & Connolly, Hill Building, Washington, D.C. 20006 and 40 copies express mailed to the Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington D.C. 20543.

By: Alan G. Greer
ALAN G. GREER

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Charles G. REBOZO,
Plaintiff-Appellant-Cross Appellee,

v.

The WASHINGTON POST COMPANY,
Defendant-Appellee-Cross Appellant.

No. 78-3403.

United States Court of Appeals,
Fifth Circuit.

Feb. 19, 1981.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, RONEY and HATCHETT, Circuit Judges.

RONEY, Circuit Judge:

This is an appeal from a summary judgment entered for the defendant newspaper in a defamation suit. The district court found that plaintiff was a public figure and that no genuine issue of material fact existed as to whether defendant acted with actual malice. We affirm the court's finding that plaintiff is a public figure. We reverse, however, as to the decision that there was no genuine issue of material fact on the question of whether defendant acted with actual malice in publishing the newspaper article that forms the basis of this suit, and remand for further proceedings.

I. *FACTS*

Because the case was decided on defendant's motion for summary judgment, we must construe the record most favorably to plaintiff. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 162 n.5, 99 S.Ct. 2701, 2705 n.5, 61 L.Ed.2d 450 (1979); *Time, Inc. v. Ragano*, 427 F.2d 219, 221 (5th Cir. 1970).

In June 1973 Ronald Kessler, a reporter with substantial financial and reporting experience for defendant's newspaper, *The Washington Post*, was assigned by his editor to prepare a series of articles on the finances of then-President Richard M. Nixon. As part of his preparation Kessler became interested in plaintiff Charles G. Rebozo because of his relationship with the former President. Rebozo had been, and continues to be, a close friend and financial adviser of the former President, and serves as chairman of the board and president of the Key Biscayne Bank in Miami.

Newsday, a Long Island, New York, newspaper in 1971 had published a series of articles about Rebozo, one of which described a Miami lawsuit involving allegations that the Key Biscayne Bank had converted 900 shares of stock belonging to E.F. Hutton & Co. Some of the stock had apparently been pledged as collateral for a loan at the Key Biscayne Bank, and was later sold when the loan was called. During the course of his investigation, Kessler reviewed the file in the case, which by that time was pending in this Court on appeal, in order to determine whether it contained any subsequent unreported developments. See *Fidelity & Casualty Co. v. Key Biscayne Bank*, No. 70-619-Civ-JLK (S.D.Fla. Jan. 24, 1972) (order granting defendant's motion

for directed verdict), *vacated and remanded*, 483 F.2d 438 (5th Cir. 1973), *dismissed* (S.D.Fla.1973), *aff'd*, 501 F.2d 1322 (5th Cir. 1974).

Among other things Kessler studied the deposition of George H. Riley, Jr., who had been retained to investigate a claim filed by E.F. Hutton with its s ety, the Fidelity and Casualty Company of New York. In his deposition, Riley described a meeting he had with Rebozo in October 1968 as follows:

Q Did you tell Mr. Rebozo at that time that the stock had been stolen or was missing from E. F. Hutton & Co.?

A Yes, sir.

Q Can you recall exactly what you told him?

A As I previously stated, I advised Mr. Rebozo that I was investigating the theft of nine 100-share certificates from the vaults of E. F. Hutton & Co. in New York.

Q Did you advise him of the numbers of the certificates that you were investigating?

A Yes. And the numbers corresponded to the numbers he gave me.

It is undisputed that 300 shares of the stock were sold on November 13, 1968, although the parties differ on whether the stock was sold by the Key Biscayne Bank itself, or on Rebozo's personal account.

After Kessler read the court file in Miami and New Orleans, he called Riley on the telephone because, as Kessler described, "I wanted, somehow to get a feeling from him, at least as to whether he understood the possible significance of his testimony." Kessler recounted a portion of his telephone conversation with Riley as follows on deposition:

Q Did you specifically ask him whether his statement in the deposition concerning his conversation with Mr. Rebozo was accurate?

A No.

Q Why not?

A I attach great significance to testimony given under oath and most newspaper articles, of course, are based on statements that are not made under oath. So, when a reporter obtains statements that are made under oath, it is certainly of more significance than otherwise.

Q It would have been significant, wouldn't it Mr. Kessler, if Mr. Riley told you he had made an error or a misstatement in his sworn testimony?

A Yes.

Q You didn't think it important to find out whether he would say whether he was right or wrong in that statement?

A No.

Q You didn't want to know what he wanted to say on that issue?

[Objection omitted]

Kessler also contacted Rebozo's attorney, who told him Rebozo "flatly denies" that Riley told Rebozo during their October 1968 meeting that the stock was stolen. The attorney followed up the conversation with a letter, repeating that Riley's testimony was false in that respect.

The question whether Rebozo personally, or the Bank, had cashed the stock was the subject of an October 6 internal memorandum from Kessler to his *Post* editor, Harry Rosenfeld, prompted by the telephone conversation between Kessler and Rebozo's attorney. A portion of that memorandum states:

> So who cashed the stock? Neither Rebozo nor other witnesses were asked this question in the depositions. There are no other legal papers in the court file to answer the question.
>
> But there are copies of the bills, receipts, and checks covering the sale transaction. As is clear from the attached, they all bear Rebozo's name.
>
> * * * * * *
>
> The fact that Rebozo's name appears on them, and that the transactions were executed on his personal account, appear to me to be more than sufficient evidence for the purposes

of an accurate and fair newspaper account of what appears in the court file that Rebozo technically and substantively cashed the stock.

Kessler and Rosenfeld discussed the content of an article Kessler had prepared on the stock transaction, and reviewed the sources of the information contained in the article.

On October 25, 1973, *The Washington Post* published a front-page article containing the headline, "Bebe Rebozo Said to Cash Stolen Stock," accompanying a photograph of plaintiff, and the following four paragraphs:

> Charles G. (Bebe) Rebozo, President Nixon's close friend, cashed $91,500 in stolen stocks in 1968 after he was told by an insurance investigator it was stolen, the investigator's sworn statement and other records in a Miami court file indicate.
>
> A lawyer for Rebozo conceded the investigator visited Rebozo but said Rebozo "flatly denies" the investigator told him the stock was stolen.
>
> The $91,500 in securities represented 300 of the 900 shares of International Business Machines Corp. stock that federal prosecutors say was stolen by the Mafia in 1968 from the vaults of E. F. Hutton & Co., a New York stock brokerage firm.
>
> The stock came into Rebozo's possession when it was offered as collateral for a loan

from Rebozo's bank, Key Biscayne Bank in Florida.

The story continued for a total of 126 paragraphs, with the balance of the article appearing on pages A14 and A15 of defendant's newspaper. The "main point" of the story, according to Kessler, was contained in the "lead," or first paragraph. Farther along in paragraph number 99, the *Post* article quoted the passage from investigator Riley's deposition, in which Riley was questioned about whether the stock "had been stolen *or was missing.*" (emphasis added).

Rebozo's complaint contends the article's lead sentence is false in two respects: (1) the investigator did not tell him the stocks were stolen; and (2) the stocks were cashed by the bank, not by him. The question of the article's falsity, however, is not an issue in this appeal.

II. *WAS REBOZO A PUBLIC FIGURE?*

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court held that a public official cannot recover damages for defamation relating to official conduct absent a showing of " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80, 84 S.Ct. at 725-26. Three years later the Court held in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), that the *New York Times* standard is applicable to "public figures" as well. *See also Associated Press v. Walker*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). The Court elucidated the applicability of *New*

York Times to public figures, but refused to expand the protection afforded by that standard to actions brought by private persons, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-47, 94 S.Ct. 2997, 3009-10, 41 L.Ed.2d 789 (1974).

Application of the *New York Times* rule to public figures, the Court observed, is supported by two factors. First, public figures, because they "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements that private individuals normally enjoy," are less vulnerable to injury from defamatory statements. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 344, 94 S.Ct. at 3009; *see Wolston v. Reader's Digest Association, Inc.*, 443 U.S. at 164, 99 S.Ct. at 2706. A second consideration, and one that has been given greater weight by the Court, is that public figures, the news media may assume, "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345, 94 S.Ct. at 3009. The Court went on to describe two ways in which a person may become a public figure for first amendment purposes.

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

418 U.S. at 345, 94 S.Ct. at 3009. *See also Wolston v. Reader's Digest Association, Inc.* 443 U.S. at 164, 99 S.Ct. at 2706; *Time, Inc. v. Firestone*, 424 U.S. 448, 453, 96 S.Ct. 958, 964, 47 L.Ed.2d 154 (1976). Thus, under the analysis suggested in *Gertz v. Robert Welch, Inc.*, two types of public figures emerge: Those who are public figures for all purposes, and those who are public figures for a limited range of issues.

The district court held as a matter of law that plaintiff "had achieved such pervasive fame and notoriety as of . . . the date of publication . . . that he had become a public figure 'for all purposes and in all context' " (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. at 351, 94 S.Ct. at 3012). Our review of this conclusion requires that we consider, first, whether plaintiff's purported status as a public figure is appropriate for decision on summary judgment and, second, whether the evidence considered in a light most favorable to plaintiff, shows him to be a public figure for the purposes of this litigation.

[1] The Supreme Court has on numerous occasions, treated the public figure and public official questions as matters of law, for the trial court to decide. *See, e.g., Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789; *Rosenblatt v. Baer*, 383 U.S. 75, 88, 86 S.Ct. 669, 677, 15 L.Ed.2d 597 (1966). This Court has observed in this same context that "where undisputed facts admit to but one conclusion, then, on motion for summary judgment, the court properly decides the issue." *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 862 (5th Cir. 1978). Even if summary judgment were improper because of issues of fact that

could only be resolved after evidentiary hearing, the trial court, not a jury, must determine whether the evidence showed that plaintiff was a public figure. *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980). In the absence of conflicting inferences to be drawn from the record in this case, we conclude the district court was justified in considering the public figure question on summary judgment.

[2] The record in this case contains sufficient undisputed facts to show that Rebozo, at the time of publication, was a public figure. As is well known, Rebozo was President Nixon's closest friend while Nixon was in the White House. While this in and of itself has considerable significance, we need not decide whether a confidential relationship with the President of the United States automatically converts one into a public figure, since the record indicates Rebozo had in other ways voluntarily exposed himself to the risk of close public scrutiny.

Rebozo played a substantial role in the former President's financial affairs, acting as the President's agent in the management of the President's bank accounts at the Key Biscayne Bank, and in the purchase of two homes. Plaintiff also played a role in the purchase and sale of other investments for the former President. In addition Rebozo's relationship with the President was not confined to counseling on business and financial matters. Rebozo freely admitted he offered his opinions to President Nixon on various matters, and transmitted to the former President the views of other important people on certain policy matters. The two discussed the Watergate situation when it began to arise in late 1973.

More significantly for purposes of this case, Rebozo played an active role in the President's 1972 re-election campaign, helping to arrange major contributions for the President's political benefit. The Senate Select Committee on Presidential Campaign Activities, the so-called Watergate Committee, investigated closely Rebozo's role in the 1972 campaign and his involvement in President Nixon's finances, eventually publishing five volumes of data describing Rebozo's connections with the former President and his campaign.

Press coverage of Rebozo has focused both upon his relationship to the President and upon his own business and personal affairs, although the public's interest in his activities has certainly been enhanced by his connections with the former President. The record indicates that during the six months prior to October 25, 1973, the date of the *Washington Post* article, *The New York Times* published 48 articles mentioning Rebozo, while *The Miami Herald* published 76. Prominent stories in 1968 and 1971, in *The New York Times* and *Newsday*, described Rebozo's business and financial dealings in some detail. Rebozo himself recognized, "[W]hen you are traveling in the circles that I have traveled in, there are press people all over the place."

In view of the foregoing, Rebozo, met, as a matter of law, both *Gertz v. Robert Welch, Inc.*, public figure considerations. First, he "enjoy[ed] significantly greater access to the channels of effective communication and hence [had] a more realistic opportunity to counteract false statements than private individuals enjoy." 418 U.S. at 344, 94 S.Ct. at 3009. There is evidence in the record that following publication of the *Post* article,

both *The Miami Herald* and a major television network published Rebozo's response.

Second, on the basis of his voluntary activities, "the communications media [were] entitled to act on the assumption" plaintiff "had voluntarily exposed [himself]" to the risk of close public scrutiny. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345, 94 S.Ct. 3009. Rebozo's activities—including his association with President Nixon, taking part in his financial affairs, and involvement with the re-election effort—made him a prime subject of public comment.

Accordingly, we affirm the district court's conclusion that for the purposes of this litigation plaintiff Rebozo was a public figure at the time this article was published.

III. *WAS THE MALICE QUESTION APPROPRIATE FOR RESOLUTION ON SUMMARY JUDGMENT?*

The district court, having decided that plaintiff was a public figure, applied the correct standard of liability but held there was no genuine issue of material fact on the question of "actual malice," as defined by *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26. Because we conclude that the facts in this case, taken in a light most favorable to Rebozo, raised such an issue of fact, we reverse the summary judgment entered for defendant.

[3] In *New York Times Co. v. Sullivan*, the Supreme Court held the First Amendment precludes recovery by a public official for defamation unless the plaintiff can prove the statement was made with actual malice.

A person has acted with actual malice when a statement is made with knowledge that it was false, *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26, or with a high degree of awareness of the statement's probable falsity, *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964), or with reckless disregard of whether the statement was false or not, *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26. *See Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980); *Long v. Arcell*, 618 F.2d 1145, 1147 (5th Cir. 1980). The Supreme Court has further defined the phrase "reckless disregard":

> There must be sufficient evidence to permit the conclusion that the defendant in fact entertained *serious doubts* as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968) (emphasis added). *See* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 Va.L.Rev. 1349, 1370-75 (1975). Recklessness cannot be inferred, however, from the mere combination of falsehood and the defendant's general hostility toward the plaintiff, nor may reckless disregard be inferred from negligence. *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6, 10, 90 S.Ct. 1537, 1539, 26 L.Ed. 2d 6 (1970); *St. Amant v. Thompson*, 390 U.S. at 731, 88 S.Ct. at 1325.

The parties argue at some length as to whether summary judgment is a "peculiarly appropriate vehicle

for the disposition of libel suits governed by the actual malice standard of *New York Times.*" Appellee's brief at 30. In all candor, there is a certain amount of confusion in our cases on this question. Some of our cases have recognized that the plaintiff's standard of proof on the actual malice issue is higher than other issues and have thus concluded that actual malice is "an issue which lends itself to summary judgment." *E.g., Southard v. Forbes, Inc.*, 588 F.2d 140, 146 (5th Cir. 1979), *cert. denied*, 444 U.S. 832, 100 S.Ct. 62, 62 L.Ed.2d 41 (1980). Other cases have suggested that the need under the First Amendment to protect publishers from the chilling effect of a long and expensive trial justifies a presumption in favor of summary judgment. *See Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 864-65 (5th Cir. 1970); *Time, Inc. v. McLaney*, 406 F.2d 565, 566 (5th Cir. 1969). Other cases, however, have recognized that actual malice refers to the mental state of the defendant with respect to the truthfulness of the allegedly defamatory material and that "[p]roof of such a mental state must usually be inferred from circumstances difficult to develop on motion for summary judgment." *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir.), *cert. denied*, 404 U.S. 864, 92 S.Ct. 49, 30 L.Ed.2d 108 (1971). *See also Time, Inc. v. Ragano*, 427 F.2d 219 (5th Cir. 1970). Even those cases strongly urging summary judgment describe it as proper only where the record is "devoid of genuine issues of fact" on the actual malice question. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d at 865.

In view of this uncertainty, it is appropriate to examine closely the recent Supreme Court authority related to this inquiry. The subjective nature of the evidence a plaintiff must rely on was emphasized by the Supreme Court in *Herbert v. Lando*, 441 U.S. 153,

99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), where it was held that "any direct or indirect evidence relevant to the state of mind of the defendant," *id.* at 165, 99 S.Ct. at 1643, could be used to support plaintiff's burden of showing actual malice with convincing clarity. The implications of this holding with respect to summary judgment disposition were noted in a case decided that same term, *Hutchison v. Proxmire*, 443 U.S. 111, 120 n.9, 99 S.Ct. 2675, 2680 n.9, 61 L.Ed.2d 411 (1979):

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254 [84 S.Ct. 710, 11 L.Ed.2d 686] (1964), and does not readily lend itself to summary disposition. See 10 C. Wright & A. Miller, Federal Practice and Procedure §2730, pp. 590-592 (1973). Cf. *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979).

Herbert v. Lando also casts serious doubt on the notion that the chilling effect of a long and expensive trial justifies a presumption in favor of summary judgment, at least to the extent that such a presumption exceeds the balance struck between the rights of publishers and defamation plaintiffs in *New York Times v. Sullivan*. The Court reiterated that the First Amendment does not provide a publisher complete immunity and that if "inhibition flows from the fear of damages liability for publishing knowing or reckless falsehood, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment." 441 U.S. at 171, 99 S.Ct. 1646,

60 L.Ed.2d 115. While the Court recognized the burden and expense of pre-trial discovery in First Amendment defamation cases, that was not enough, it held, to modify the standard set in *New York Times v. Sullivan*. 441 U.S. at 175-77, 99 S.Ct. 1648-49, 60 L.Ed.2d 115.

Laying aside the suggestion that the potential chilling effect of the burdens of litigation are in and of themselves grounds for preferring summary judgment, an idea repudiated by *Herbert v. Lando*, the cases in this Circuit can be reconciled. These cases stand for the principle that the standard of review in First Amendment defamation actions, as in all summary judgment cases, is whether the record, construed in a light most favorable to the party against whom the judgment has been entered, demonstrates there are genuine issues of fact which, if proven, would support a jury verdict for that party. Since, however, a jury verdict in a defamation case can only be supported when the actual malice is shown by clear and convincing evidence, rather than by a preponderance of evidence as in most other cases, *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1258 (5th Cir. 1980), the evidence and all the inferences which can reasonably be drawn from it must meet that higher standard.

[4] On this record we conclude the district court was confronted with a genuine issue of material fact on the details of investigator Riley's conversation with Rebozo, and reporter Kessler's review of it. In investigating the story, even though Kessler went to the trouble of calling Riley, he failed to review with Riley the words in Riley's earlier deposition upon which Kessler eventually based the article's lead. Regardless of whether Riley knew at the time of his conversation

with Rebozo whether the pledged stock had in fact been stolen, the seminal question may be what Riley actually told Rebozo before the stock was sold to cover the loan. We note in passing that on the second appeal in the conversion case, the Court found that not until December 1968, nearly two months after the stock sale, did E. F. Hutton learn that the stock involved in this case was among those shares that had been missing from its vault. *Fidelity & Casualty Co. v. Key Biscayne Bank*, 501 F.2d 1322, 1324 (5th Cir. 1974). Despite Kessler's professed belief in the veracity of Riley's deposition testimony, Kessler's resolution of the obvious ambiguity whether Riley told Rebozo the stock was (a) missing, (b) stolen, or (c) missing or stolen, in favor of the most potentially damaging alternative creates a jury question on whether the publication was indeed made without serious doubt as to its truthfulness. *St. Amant v. Thompson*, 390 U.S. at 732, 88 S.Ct. at 1326.

There is, moreover, a material question of fact suggested by Kessler's October 6, 1973 memorandum to his editor, in which the reporter expressed uncertainty about whether the Key Biscayne Bank or Rebozo himself cashed the stock. Kessler stated in that memorandum that if the bank, rather than Rebozo, had actually cashed the stock, the article's proposed lead paragraph would have to be modified. This memorandum, plus the fact that Kessler resolved the uncertainty expressed in it in such a way as to cast plaintiff Rebozo in the worst possible light and to make for Kessler a front-page story of an episode which otherwise might not have commanded any significant attention, when taken in a light most favorable to Rebozo, could amount to evidence of the reporter's reckless disregard for the truth or falsity of the assertion that "Charles G. (Bebe) Rebozo,

President Nixon's close friend, cashed $91,500 in stolen stock . . . ." *See St. Amant v. Thompson*, 390 U.S. at 731-32, 88 S.Ct. at 1325-26; *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26. Thus we cannot say "the record is devoid of genuine issues of fact as to whether the alleged defamatory statement was published with actual knowledge of its falsity or with reckless disregard of whether it was true or false." *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d at 865. Accordingly, the district court's summary judgment on the question of actual malice is reversed and the case is remanded for further proceedings.

REVERSED AND REMANDED.

The Washington Post, October 25, 1973

Bebe Rebozo Said to Cash Stolen Stock

By Ronald Kessler
Washington Post Staff Writer

Charles G. (Bebe) Rebozo, President Nixon's close friend, cashed $91,500 in stolen stocks in 1968 after he was told by an insurance investigator it was stolen, the investigator's sworn statement and other records in a Miami court file indicate.

A lawyer for Rebozo conceded the investigator visited Rebozo but said Rebozo "flatly denies" the investigator told him the stock was stolen.

The $91,500 in securities represented 300 of the 900 shares of International Business Machines Corp. stock that federal prosecutors say was stolen by the Mafia in 1968 from the vaults of E. F. Hutton & Co., a New York stock brokerage firm.

The stock came into Rebozo's possession when it was offered as collateral for a loan from Rebozo's bank, Key Biscayne Bank in Florida.

In a civil suit filed against the bank by Hutton, Rebozo said in a deposition that he gave the loan at the request of an old friend, Walter A. (Jake) Jernigan.

The loan was given to a friend of Jernigan's.

In a deposition taken under oath, George H. Riley Jr., an insurance investigator with Continental Insurance Cos., said he attempted to tell Rebozo the stock was stolen in October, 1968, but Rebozo twice canceled the appointments.

During this time, records in the court file show, Rebozo was in the process of selling 600 of the 900 shares of stock and of receiving the proceeds of the sale.

Riley said that when he finally met with Rebozo and told him the 900 shares was stolen, Rebozo claimed he had already sold them.

However, the records in the court file show Rebozo did not sell the remaining 300 shares until more than a week after Riley's visit.

After the visit, Riley filed a report on the interview with his head office in New York. In it, he said Rebozo "did not talk freely" and Riley suspects Rebozo was aware the transaction was "shady."

Eight persons, four of them identified by prosecutors as members or associate members of the Mafia, were indicted in 1970 for conspiring to steal the stock. Except for a defendant who is a fugutive from justice and another who was placed in an insane asylum, all were convicted the following year.

When the indictments were announced, the Justice Department's Organized Crime Strike Force in Miami said no evidence had been developed that Rebozo was involved in the plot or was aware the stock was stolen.

It was not until after the criminal case was completed in late 1971 that Riley's deposition was entered in the civil suit court file. The contents of the deposition have never been previously reported.

Asked what he would do if there were evidence that Rebozo was told the stock was stolen before he sold it, Dougald D. McMillan, chief of the Strike Force, said:

"If we have evidence of a federal criminal offense involving anyone, we will pursue it, and if warranted, present the evidence before the grand jury."

Federal law provides a fine of up to $10,000 or a prison term of up to 10 years, or both, for anyone who knowingly stores, sells, disposes of, or accepts as collateral

for a loan securities in interstate commerce that have been stolen or unlawfully converted.

Rebozo is Mr. Nixon's close friend. Based on publicly known transactions, he is Mr. Nixon's second-biggest benefactor, after their mutual friend, Robert H. Abplanalp.

Rebozo, born in 1912 in Tampa, Fla., of Cuban parents, had been in a succession of small businesses, beginning with a gasoline station and tire recapping business. Later, he operated laundromats and a small loans company.

Since Mr. Nixon became President in 1969, Rebozo has shown up frequently in his financial and personal affairs. He visits Mr. Nixon at his Camp David retreat, at his San Clemente home, and at the Bahamian Island owned by Abplanalp.

Rebozo was recently in the news as the recipient of $100,000 in cash said to be a campaign contribution from Howard Hughes to Mr. Nixon. However, the cash was delivered in 1969 and 1970, when Mr. Nixon was not in a campaign.

Rebozo's home in Key Biscayne is adjacent to Mr. Nixon's two homes, which were purchased with the help of Rebozo's lawyer and officer in his bank, Thomas H. Wakefield.

Abplanalp also serves as a director of Rebozo's bank in Key Biscayne.

The bank, chartered by the state and insured by the Federal Deposit Insurance Corp., opened its doors

March 10, 1964, with Rebozo as chairman, president, and a stockholder. It is the only bank on the island.

Why this particular bank was chosen to give the loan that was secured by the stolen IBM stock is a mystery.

The borrower, Charles L. Lewis, had no account at the Key Biscayne Bank. An Atlanta investor, Lewis also had no business or residence in Miami.

Rebozo said in his dispostion in the civil court file that he was told that the reason Lewis wanted the loan from his bank was that he planned to open a business in Miami and wanted to establish a banking "connection" there.

However, Lewis never did open a business in Miami.

The story of the loan transaction, as told by the participants in their depositions in the court file, began when Jernigan called Rebozo and asked if he would give a $195,000 loan using stock as collateral to his friend and associate, Lewis.

The idea behind pledging stock as collateral for a loan, as Lewis did to get a loan from Rebozo's bank, is not unlike the idea behind a home mortgage loan or a car loan.

If the borrower defaults on his payments, the bank can sell the stock, home, or car to pay off the loan. The procedures for obtaining such loans also are not dissimilar, bankers say.

The borrower normally visits the bank and makes out an application. He states the reason he wants the money. Normally, the bank requires that the applicant live in the area and have an account at the bank.

The bank checks the applicant's credit, usually through a credit bureau. It also checks to make sure the collateral—home, car, or stock—is legally the property of the applicant.

If all the requirements are met, the borrower is notified and comes in for his money.

These procedures are familiar to anyone who has taken a bank loan. They differ markedly from those used by Rebozo, the court papers indicate.

After Jernigan proposed the loan to Rebozo on the t[illegible]phone, Jernigan and Lewis visited the bank on July 30, 1968. Within several hours, the court documents indicate, they applied for the loan, gave the stock as collateral, and received the money through a checking account opened in Lewis' name the same day.

The $195,000 loan was payable at $10,000 per quarter or on the demand of the bank. The interest rate was 7½ per cent per year.

A copy of the loan application filled out by a bank loan officer shows some spaces were left blank, including "recommendations of loan committee."

The copy of the application lists as collateral 900 shares of IBM stock computed at $338.75 per share, or a total of $304,875.

Wakefield, Rebozo's lawyer and an officer in the bank, said in his deposition in the court file the loan committee had given tentative approval to the loan a week earlier in a telephone poll. He said the committee did not know at the time exactly what type of collateral was being offered to secure the loan.

The loan application lists as the purpose of the loan, "Business needs—(Nationwide A/L) & buy out other party." Nationwide Airlines was a small airline of which Lewis was an officer.

Although the Federal Reserve Board, which regulates stock loans, says loan officers must be aware of the purpose of a loan, Rebozo said he had never heard of the airline listed, and he said he did not ask the name of the other party who was to be bought out.

Lewis swore in a Federal Reserve form that the statement made on the loan application was the true purpose of the loan, but he later acknowledged in his deposition that the money was not used for this purpose. Instead, Lewis said, he gave most of the money to representatives of "Henry Sturgeon," who, according to prosecutors, turned out to be fictitious.

Lewis said Jernigan was aware the money was going to Sturgeon rather than for the purpose Lewis had claimed, but the bank was not.

The testimony of Rebozo and others involved indicates no check was made on Lewis' background through a credit bureau. Instead, Rebozo said, he called Lewis' office in Atlanta to verify that he had an office.

After the money was given to Lewis, Rebozo said he felt he should make additional checks. He called F. Donald Nixon, the President's brother, because he lived in Newport Beach, Calif., were Lewis said he had another office, Rebozo said.

Rebozo said he asked the brother to "check the local bank out there to see if there was anything wrong with this fellow. And he phoned, checking back in Newport Beach."

Rebozo did not say what, if anything, Donald Nixon reported back, nor why he called Donald Nixon instead of the bank in Newport Beach.

Donald Nixon, a vice president of Marriott Corp., the hotel and restaurant chain, did not return a reporter's telephone calls.

The only other information Rebozo said he had about Lewis was that he had been introduced by Jernigan, who vouched for his reputation. Rebozo said he did not have Jernigan cosign the note obligating Lewis to repay the loan.

When a bank gives a mortgage loan, it determines that the house is legally the property of the borrower by having a lawyer or title insurance company search the land records covering the house. If the collateral for a loan is a car, the bank requires a bill of sale or title certificate.

When stock is used as collateral, the ownership normally is self-evident, because the stock certificates list the owner's name and address on the face.

The name of the owner is not always listed. Sometimes the certificates are issued in the name of the stock brokerage house that ordered them. The brokerage house keeps the stock until the owner orders it sold.

When stock is issued in this form, it is called "street name" stock. Street name stock may be requested by a stock brokerage customer if he intends to sell the stock quickly or wishes to conceal his ownership of it. If he buys the stock on credit, it must be in the street name.

Whatever the reason, bankers and stock brokers say, a customer who owns street name stock and wants to use it as collateral for a loan invariably transfers it to his own name before he presents it to the bank.

The reason is that it is difficult for a bank to tell who is the owner of the stock if it is in street name. Some banks, such as Bankers Trust Co. in New York, say they refuse to give any loans for street name stock. A vice president for security at the bank says the risk that the stock is stolen is too great.

Other banks, such as Chase Manhattan Bank in New York, say they will accept street name stock only if the borrower is a long-standing customer and if he presents evidence that the stock is his.

This evidence may be a letter or transfer slip saying the stock was transferred to the customer from the broker. The bank can then call the broker to verify that the transfer took place. This is done by citing the customer's account number listed on the transfer form.

The stock that Lewis offered as collateral for the $195,000 loan from Rebozo's bank was in street name, the name of E. F. Hutton. Rebozo said he noticed this fact, but he said the only evidence he asked for or obtained that Lewis was the owner of the stock was Lewis' statement that he owned it.

Lewis said in his deposition that he was never asked if he owned it.

Rebozo said he also noticed that the stock had been issued two years earlier, and he said he asked Jernigan how Lewis had obtained it. Jernigan said he got it in a stock swap. Rebozo said he never asked the name of the person with whom Lewis had swapped the stock.

"It was of no concern," he said. "Swap stock, people do it all the time, and they swap value for value."

Rebozo said he accepted the stock and had it transferred to Lewis' name. The next day, however, Rebozo said he had second thoughts about the stock, and he or Wakefield made calls to IBM and Hutton.

Rebozo said he also called James M. Crosby, chairman of Resorts International, Inc., which owns a gambling casino on Paradise Island off the coast of Nassau in the Bahamas.

He said he called Crosby, a friend, to get help in checking out the stock. Resort [sic] International owns Intertel, an investigative agency.

Rebozo said Crosby called IBM to determine if the stock was stolen.

Wakefield said he asked a man at Hutton if he thought the stock certificates sounded counterfeited, based on Wakefield's description over the telephone of the color of the certificates and the appearance of the signatures.

Wakefield said the man, whose name he did not know, said the securities sounded as if they were genuine.

An IBM employee said in a deposition in the court file that he checked to see if the stock was stolen and reported to Rebozo that it was not.

Thomas P. Lynch, executive vice president of Hutton, said there was no way for IBM to know whether the stock was stolen. He said this was because Hutton did not know at the time it was missing.

Lynch said Hutton and other brokerage houses do not count the stock in their vaults daily. Between checks, he said, stock may be taken without anyone knowing.

For this reason, he said, the only way a bank can tell that a borrower owns street name stock is to ask him for his account number with the broker and to call the broker.

"He (Rebozo) did everything except what he was supposed to do," Lynch said.

Lynch said it also is unusual for a bank to give such a large loan on street name stock.

Two of the country's largest banks, First National City in New York and Chase, said they would consider a $195,000 loan to be large and would take unusual precautions when giving it.

The two banks' assets of $37.3 billion and $26.1 billion, respectively, compare with $7.7 million for Rebozo's bank in 1968. (Because of the loan's size, Rebozo's bank shared it with another Miami bank.)

The Hutton firm eventually discovered that the stock was stolen, and the FBI traced it in early October to Rebozo's bank. Lynch said it was traced from IBM records showing the bank had the stock transferred to Lewis' name.

Prue C. Clinkscales, an FBI agent, visited the bank and looked at its file on the loan, but according to Rebozo, Clinkscales praised him for making checks on the stock.

"I asked him if there was anything wrong with the stock," Rebozo said, and Clinkscales replied, "We don't have any knowledge of that; we were just asked to see your files."

Attempts to determine if Clinkscales knew the stock was stolen, and if so, why he did not tell Rebozo, were unsuccessful. Agent Clinkscales told a reporter he had no comment and would not listen to any questions.

Rebozo said that "immediately" after the visit from Clinkscales, he decided to cancel the loan.

Asked why, he said, "Actually, from the beginning some of the directors didn't like the loan. They thought that since the man didn't live and work in our community, and since the fact that it was in street name originally, and we had to go through all this effort to do it . . . I had gone on the assurances that he was going to establish a business in Miami, and expected him to maintain a compensating balance in accordance with general banking procedures. And the combination of circumstances that ensued dictated it would be prudent to call the loan."

Wakefield noted that a state banking examiner had criticized the bank for making such a large loan to someone outside the bank's geographic area.

"I said, couple that (the FBI inquiry) with what the bank examiner's comments had been, I thought we ought to call the loan," Wakefield said.

If Rebozo had canceled the loan and it had been repaid from Lewis' own funds, there would have been no loss to Hutton. But a telegram from Rebozo to Lewis dated Oct. 7, 1968, shows Rebozo gave Lewis two days to come up with the money.

Lewis said in his deposition that he told Rebozo he could not get the money "in the period of time that he was willing to give us (Lewis and his business associates)."

Rebozo was not asked in his deposition why he allowed Lewis only two days to pay off the loan.

Whatever the reason, Lewis did not come up with the cash. Rebozo decided to sell the stock that had

been put up as collateral, causing the loss to Hutton, which owned the stock.

Rebozo sold 600 of the 900 shares, producing $196,984 which was enough to pay off the loan. He continued to hold the remaining 300 shares.

Records in the court file show the first batch of stock was ordered sold Oct. 8, 1968, and the check for the proceeds was dated Oct. 17.

Riley, the insurance investigator, said in his deposition that he visited the bank on Oct. 12 or 13, after he was asked by his New York office to determine if Rebozo's bank had Hutton's stock. Hutton was insured by Riley's company.

Riley said he told the bank's loan officer he was there to investigate some stolen securities, but the officer said only Rebozo could discuss the matter.

Riley said he made appointments with Rebozo for Oct. 14 and 17, but each time they were canceled.

"On at least one occasion," he said, "his (Rebozo's) secretary stated that he was busy, and it was during the time of the Nixon campaign, and this was the excuse; that he was too busy to see me," Riley said.

The second appointment was canceled the day the check for the proceeds of the first 600 shares of stock was issued.

Five days later, Riley met with Rebozo. Riley said he told Rebozo at this meeting on Oct. 22 that he

wanted to determine if the bank had the stolen stock.

Riley said Rebozo told him he already had given all the information to the FBI. However, Riley said Rebozo did show him the certificate numbers of the stock as they appeared before the stock was transferred to Lewis' name.

The questioning of Riley in his deposition continued:

Q. Did you tell Mr. Rebozo at that time that the stock had been stolen or was missing from E.F. Hutton & Co.?

A. Yes, sir.

Q. Can you recall exactly what you told him?

A. As I previously stated, I advised Mr. Rebozo that I was investigating the theft of nine 100-share certificates from the vaults of E. F. Hutton & Co. in New York.

Q. Did you advise him of the numbers of the certificates that you were investigating?

A. Yes. And the numbers corresponded to the numbers he gave me.

The next day, Riley wrote in a report to his New York office that Rebozo claimed he already had sold all the stock.

The report was supported by a deposition of Riley's superior, who said Riley gave him an oral rundown on

the interview after it took place.

In the report, Riley said, "It should be pointed out that I do not believe Mr. Rebozo was giving me all the information available to him and he would not go get his file . . . This would appear to me to be a shady deal, and I suspect that Mr. Rebozo is aware of this and did not want to become involved, which accounts for his reluctancy in his discussion with me. He did not talk freely, and the information that was obtained was difficult to extract."

Asked in his deposition why Rebozo would not get his file on the loan, Riley said, "I can say that Mr. Rebozo didn't even want to give me the time of day, let alone get his file."

Asked in a telephone interview if prosecutors were aware of his testimony, Riley, an insurance investigator 20 years, said not to his acknowledge [sic]. He declined to discuss the case further.

Rebozo did not return repeated telephone calls from a reporter. Rebozo's lawyer, Alan G. Greer, told The Washington Post that Rebozo "flatly denies" having been told the stock was stolen. Greer said Riley met with Rebozo, with only Rebozo and Riley present, and that Riley did not say the stock Greer said Riley met with Rebozo [sic], was stolen.

The court files show that a day after Riley's visit, Rebozo wrote to Lewis to ask him if he wanted the remaining 300 shares of stock sold. The letter enclosed Lewis' note, marked "paid," meaning Lewis no longer was under obligation to the bank.

The letter to Lewis closed this way:

"Everything thus far has worked out well for both of us and if I receive any further information with respect to the matter involving the certificates, I will let you know immediately."

Asked in his deposition what this meant, Rebozo said, "That must have been in reference to the inquiries made (by the FBI)."

The remaining 300 shares were ordered sold Oct. 31, more than a week after Riley's visit to Rebozo. The check was dated Nov. 13.

Rebozo's lawyer, Greer, said in a telephone interview that the stock was sold by "the bank," not by Rebozo. However, the court file shows that the slip confirming the sale, the receipt for the securities, and the check with proceeds of the sale were all marked to the attention of Rebozo.

The money from the sale, $91,574, was credited to Lewis' account at Rebozo's bank. On Dec. 16, Lewis withdrew most of the money from his account, a copy of his bank statement shows.

This was nearly two months after Riley said he told Rebozo the stock was stolen.

Lewis said he gave $120,000 of the total cash he received from the loan to representatives of the fictitious Sturgeon. He said he used the rest in business ventures.

None of the money was recovered, and the insurance company reimbursed Hutton for its loss in December.

In May, 1970, the insurance company sued the bank in an attempt to recover the money. The bank later sued Hutton and Lewis, and Hutton sued the bank. These separate actions are all part of the same case.

The insurance company's complaint, 1½ pages long, said only that the bank had illegally converted the stock to its own use when it changed the name on the stock certificates to Lewis'. The complaint, and the legal case, did not deal with Rebozo's subsequent sale of the stock after Riley said he told Rebozo it was stolen.

U.S. District Court Judge James L. King who was appointed by President Nixon in 1970, ruled in favor of the bank last year. The actions by Key Biscayne Bank against Lewis and Hutton were withdrawn.

"We tried the case on a narrow legal issue, conversion," John R. Hoehl, the Miami lawyer who presented the case for the insurance company, said in an interview. Conversion is an act that deprives someone of his property.

"It backfired on us," Hoehl said. "We felt we didn't have to show what they should have done" to determine whether the stock was owned by Lewis.

A transcript of the one-day trial Jan. 24, 1972, shows Judge King shut off discussion of procedures normally used by banks to determine if street name

stock is owned by a loan applicant. He compared such testimony to a witness giving an opinion in a car accident case on who was negligent.

Judge King said this was up to the [sic]

In 1963 and 1964, Judge King, then a Miami lawyer, was a director of Miami National Bank when it was indebted through a mortgage to the Teamsters Union pension fund.

Judge King's fellow directors included Lou Poller, later named as un-indicted coconspirator with Meyer Lansky for allegedly skimming profits from a Las Vegas hotel; Alan M. Kornbluh, who has acted as trustee on a teamster mortgage and is Poller's son-in-law; and Arthur A. Desser, a friend of former Teamster President James R. Hoffa.

Judge King said he was not aware of the Teamster mortgage at the time he was a Miami National Bank director. "If I had known of any Teamster involvement, I would not have served," he said.

The Key Biscayne Bank case was appealed June 7, 1972, to the Fifth Circuit Court of Appeals in New Orleans. The Appeals Court recently sent the case back to Judge King for a more explicit, written opinion.

The stolen stock, according to the original criminal indictment, had been given to Lewis' lawyer, Martin Fox of New York, by mobsters Joseph (Joe Black) Lamattina and Daniel Mondavano.

They obtained the stock from Jacob (Jake the Mace) Maislich, the indictment said. Maislich pleaded guilty in another stolen securities case involving Anthony (Fat Tony) Salerno and Gilbert (Gil the Brain) Beckley.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 70-619-Civ-JLK

FIDELITY AND CASUALTY COMPANY
OF NEW YORK,

Plaintiff,

vs.

THE KEY BISCAYNE BANK,

Defendant/
Third-Party Plaintiff,

vs.

CHARLES L. LEWIS, et al.,

Third-Party Defendants.

66 West Flagler Street,
Miami, Florida,
Monday, 9:45 a.m.,
October 11, 1971.

DEPOSITION

of

GEORGE H. RILEY, JR.
taken on behalf of the defendant/third-party plaintiff
pursuant to stipulation of counsel

APPEARANCES:

BLACKWELL, WALKER & GRAY, by
JOHN KELLEY, Esq., of counsel,
Attorneys for Plaintiff.

FRATES, FLOYD, PEARSON & STEWART, by
ALAN G. GREER, Esq., of counsel,
Attorneys for Defendant/Third-Party Plaintiff.

HIGH, STACK, DAVIS & LAZENBY, by
LEONARD KLATT, Esq., of counsel,
Attorneys for Third-Party Defendant
Charles L. Lewis.

STIPULATIONS

It is stipulated and agreed by and between counsel for the respective parties that:

1. Reading and signing of the deposition by the witness are waived;

2. Notice of filing of the deposition is waived.

Thereupon:

GEORGE H. RILEY, JR.

was called as a witness and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GREER:

Q Please state your full name, sir.

A George H. Riley, Jr.

Q Where do you reside, Mr. Riley?

A 3413 West Lake Place, Miramar, Florida.

Q Where are you presently employed?

A Underwriters Adjusting Company, 269 Giralda Avenue, Coral Gables, Florida.

Q In what capacity, sir?

A Manager.

Q How long have you been with the Underwriters Company?

A Seventeen years on October—I mean November 8 of this year.

Q In your capacity of your present employment, are you called upon to represent the Fidelity and Casualty Company of New York?

A Yes.

Q What capacity does that representation take?

A Manager.

Q Are you manager in the sense that you sell insurance? What type of managerial function do you perform?

A I am the manager of Underwriters Adjusting Company.

Q I am hazy in my own mind as to what the relationship is between that company and the Fidelity and Casualty Company.

A Underwriters Adjusting Company is a wholly-owned subsidiary corporation of the Continental Corporation. The Fidelity and Casualty Company is a wholly-owned corporation owned by the Continental Corp.

Q What specific functions does your company perform for the Continental group?

A We provide total claim service.

Q Were you in any way involved in or connected with a claim presently being made by the Fidelity and Casualty Company in relation to 900 shares of IBM stock, the numbers of which are IBM Certificate Nos. AE006614 through AE006622, which were presented in the summer of 1968 to The Key Biscayne Bank as collateral on a loan?

MR. KELLEY: Excuse me.

Mr. Riley, as you know from your motion for production with the Court, made a memorandum concerning whatever stocks he investigated. I did not know whether you would want him to refer to that at this time.

I will ask him if he needs to refer to it.

A In answer to the first part of the question, I'll say yes, I was involved in a limited investigation in this claim.

But I cannot testify as to the numbers involved or the correctness of the numbers you gave without reference to my memorandum.

Q Do you have your memorandum here with you at this time?

MR. KELLEY: I have a copy.

Q Would you refresh your memory from that memorandum and see if you can confirm from the memorandum the stock certificate numbers to which we have just been referring.

A The stock certificate numbers as given me by Mr. Rebozo were nine certificates of 100 shares each; Nos. AE00614 through AE00622, inclusive.

Q When was the first time—by "time," I mean point in time; physical date—you were contacted by either your company or the Fidelity and Casualty Company in reference to these particular stock certificates?

A It was approximately mid-October, 1968.

Q What was the nature of that contact, if you recall, sir?

A I was asked to contact Key Biscayne Bank to determine if stock which had been stolen from our insured vault was pledged as collateral for a loan at The Key Biscayne Bank.

Q When was the first date upon which you made any sort of contact with Key Biscayne Bank in reference to this inquiry?

A Could I refer to my memorandum?

Q Please do, sir.

A It was—I do not have the exact date. However, it was one or two days prior to October 14, 1968.

Q One or two days prior to the 14th?

A Yes, sir.

Q Of what did that contact consist?

A It consisted of me getting in my car, driving to Key Biscayne Bank, and seeking out the individual at the bank with whom to speak.

Q To whom did you speak on that first occasion?

A The first time I spoke with a Mr. Stearns who was the loan officer or who was identified to me as the loan officer.

Q Of what did your conversation with Mr. Stearns consist, if you recall?

A I advised that I represented the bonding company for E. F. Hutton & Co. and that I was there to investigate some stolen stock certificates.

Q Did you identify those certificates?

A I did not identify any certificates to Mr. Stearns. I did not become involved in the discussion of this at all with him.

Q Specifically, when I talked about identification, did you tell him the general nature of the stock; that it was IBM stock?

A I don't recall the full extent of the conversation with Mr. Stearns, other than that he said that he was not the proper party to speak with about anything and that I'd have to come back.

Q Did he indicate whom the proper party was?

A He said that the only party that could assist me would be Mr. Rebozo.

Q Did you later in fact speak with Mr. Rebozo?

A After many attempts or several attempts.

Q What were the dates and nature of these attempts, please?

A Well, there was an appointment made for the 14th, which was not kept by Mr. Rebozo. There was

another appointment made for the 17th, which was not kept by Mr. Rebozo.

But I did talk with him on the 22nd of October, 1968.

Q Were there any reasons given for his not keeping the 14th and 17th appointments?

By "he," I am referring to Mr. Rebozo.

A On at least one occasion his secretary stated that he was busy, and it was during the time of the Nixon campaign and this was the excuse; that he was too busy to see me.

Q Where did the meeting on the 22nd of October take place?

A In the conference room of The Key Biscayne Bank.

Q Who was present at that meeting, if you recall?

A Myself and Mr. Rebozo were the only people.

Q What transpired at that meeting, if you recall?

A I advised that I represented the bonding company for E. F. Hutton & Co. and that I wanted to discuss IBM stock which had been pledged as collateral for a loan which was made by The Key Biscayne Bank.

Q At the time of this conference you knew that the stock had been pledged; is that correct?

A I was told that the stock had been pledged.

Q Who informed you that the stock had been pledged?

A Mr. Condon.

Q Mr. Condon is your superior?

A Mr. Condon works in our New York office.

Q Do you recall exactly what Mr. Condon told you about the stock?

A That it was missing from the vault of E. F. Hutton & Co.; and that nine 100-share certificates had been pledged for a loan—pledged as collateral for a loan—at The Key Biscayne Bank.

Q Did he tell you who had pledged this stock as collateral?

A I do not recall.

Q Going back to your conversation with Mr. Rebozo, as I understand your earlier testimony you informed Mr. Rebozo that you were interested in 900 shares of IBM stock; is that correct?

A That's correct.

Q Would you continue with what transpired from that point.

A I merely asked that I would like to verify the serial numbers of the stock which had been pledged

and that I wanted some information concerning the loan, et cetera.

Q Did Mr. Rebozo give the information that you requested?

A He stated that I should get my information from Mr. Clink Scales of the FBI to whom he had given this information approximately ten days prior.

Q Did you see any of the bank records at that time?

A No. I did not see any of the bank records.

Mr. Rebozo did produce the numbers of the stock certificates and this was the only thing. He did not produce any file.

Q Did you tell Mr. Rebozo at that time that the stock had been stolen or was missing from E. F. Hutton & Co.?

A Yes, sir.

Q Can you recall exactly what you told him?

A As I previously stated, I advised Mr. Rebozo that I was investigating the theft of nine 100-share certificates from the vaults of E. F. Hutton & Co. in New York.

Q Did you advise him of the numbers of the certificates that you were investigating?

A Yes. And the numbers corresponded to the numbers he gave me.

Q Did you then talk with the FBI?

A No, sir, I did not talk with the FBI.

Q Did yo· have any further contact with The Key Biscayne F ınk?

A None other than the meeting on October 22.

Q So, as I understand it, the meeting on the 22nd was your only real meeting with the bank other than to go over there and make an appointment?

A That was my only real meeting with the bank.

Q Did you make any sort of a written memoranda or report of your meeting with the bank?

A I went straight back to the office and dictated my report to my company.

Q Do you have a copy of that report here with you today?

A Yes.

Q May I see it, please?

A [Witness complies]

MR. KELLEY: Note that this is being produced pursuant to the pleadings filed by the defendant, Key Biscayne Bank.

MR. GREER: I would like this marked as Defendant Key Biscayne Bank's Exhibit 1.

[The document referred to was marked for identification as Defendant Key Biscayne Bank's Exhibit No. 1.]

Q Sir, you have produced what has now been marked as Defendant Key Biscayne Bank's Exhibit No. 1, consisting of two typewritten pages and one handwritten page.

In looking at that, sir, at the first two typewritten pages, is that the dictated report to which you earlier referred in your testimony?

A Yes, it is the dictated report that I personally dictated.

Q Was the copy of the handwritten page which is attached to the back written by you or—

A It was not. It was addressed to me.

Q Who wrote that report?

A One of my ex-employees by the name of Larry Edmonds.

Q Do you know where Mr. Edmonds lives at this time?

A I have no earthly idea.

Q Do you know where he is employed?

A I have no earthly idea.

Q Would your company, to your knowledge, have any information concerning either his present address or employment?

A No, sir.

Q Sir, in your memorandum there is a certain amount of factual detail relating to the loan which was given by The Key Biscayne Bank to one Charles L. Lewis.

Did you obtain this detailed information from Mr. Rebozo?

A This information was obtained by—from Mr. Rebozo and I wrote it as he said.

Q So he, in fact, gave you this information at the time of your October 22 interview?

A He gave me the information, yes.

Q Does this memorandum accurately reflect, to the best of your knowledge, what transpired at your October 22 meeting and the contacts leading up to that meeting?

A It does.

MR. GREER: I have no further questions.

CROSS EXAMINATION

BY MR. KLATT:

Q May I see the exhibit, please.

A [Witness complies]

Q Mr. Riley, did Mr. Condon indicate to you where he had received his information as to the possibility of the missing stock being pledged at Key Biscayne Bank when he first contacted you?

A If he did I don't recall.

Q Did Mr. Rebozo, at the time of your meeting, indicate the physical location of the shares of stock in question?

A At the time of my meeting with Mr. Rebozo on October 22, 1968, he stated that the stock had been sold and the loan had been paid off.

Q In other words, he did not know the physical location of the shares of stock at that time?

A I can only say that he said the stock had been sold at my meeting date and that the loan had been paid off.

Q In your typewritten report here it states that you did not believe Mr. Rebozo was giving you all the information available at the time; and also that he would not give you access to his file.

Do you recall any possible reasons he may have given you for not letting you look at the file?

A I can say that Mr. Rebozo didn't even want to give me the time of day, let alone get his file.

As I indicated, he told me to contact Mr. Clink Scales with the FBI to get my information.

I was persistent and was able to get the information which is contained in my report.

Q Did you thereafter contact Mr. Clink Scales of the FBI?

A No, sir, I did not.

Q Did any employee under you contact Mr. Clink Scales?

A Not to my knowledge after October 22.

Q Did you or any employee under your supervision contact Mr. Clink Scales prior to October 22?

A Yes.

Q Can you tell me the result of such contact?

A The contact was made by Mr. Larry Edmonds, but I cannot testify as to the information he obtained. I think you will find it in the Exhibit 1.

Q You are referring to the handwritten page?

A I am.

MR. KLATT: I have no further questions.

MR. KELLEY: No questions.

[Thereupon, the witness waived the reading and signing of the deposition and the taking of the deposition was concluded at 10:10 a.m.]

CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, Richard H. Rosmarin, a Notary Public in and for the State of Florida at Large, do hereby certify that, pursuant to stipulation of counsel in the above-entitled cause, GEORGE H. RILEY, JR., was by me first duly cautioned and sworn to testify the whole truth, and upon being carefully examined testified as is hereinabove shown, and the testimony of said witness was reduced to typewriting under my personal supervision and that the said deposition constitutes a true record of the testimony given by the witness.

I further certify that the said deposition was taken at the time and place specified hereinabove and that I am neither of counsel nor solicitor to either of the parties in said suit nor interested in the event of the cause.

I further certify that I have retained the said deposition for the purpose of sealing the same and

directing it with my own hand to the court for which it was taken, delivering the same to the clerk of said court, there to remain under seal until the same shall be opened.

WITNESS my hand and official seal in the City of Miami, County of Dade, State of Florida, this _____ day of October, 1971.

_____

Exhibit to Riley's Deposition
(minus handwritten third page)

TO	Mr. Joe Hessler, Supervising Examiner Bond Department
AT	New York Office, 80 Maiden Lane, New York, N.Y.
FROM	Mr. George H. Riley, Jr., Claims Manager
AT	269 Giralda Avenue, Coral Gables, Florida 33134
SUBJECT	IBM Stock Shortage from E. F. Hutton & Company
DATE	October 23, 1968

This is a report covering your request to contact the Key Biscayne Bank.

When I initially received this report from Mr. Jim Condon by phone, I went that very day to the Key Biscayne Bank in an attempt to obtain the information requested. After a brief talk with Mr. Stearns, the Loan Officer of the Bank, it was learned that the only person that could furnish the information was C. G. (Bebe) Rebozo, President and Chairman of the Board. He could not see me this date and asked that I call and make another appointment for the 14th, which I did, but he could not keep that appointment. Another appointment was made for October 17, which he called and said he could not keep. Finally, on October 22 I was

able to see Mr. Rebozo. Most of the time during this period was spent in his active participation in the Nixon campaign, and as evidenced by the attached newspaper clipping he spent much of his time with Mr. Nixon while he was in our city.

I learned that Charles L. Lewis, the individual who secured the loan from the Key Biscayne Bank, was either brought to the bank or referred to him by a good customer of the bank. He states that Lewis brought in the nine certificates of 100 shares each (IBM Stock). The numbers on the initial nine certificates were AE00614 through AE00622, inclusive. No proof of ownership was presented to Rebozo. Rebozo states that no other securities were presented for the loan except the IBM stock mentioned above. The loan was dated about August 1, 1968, and it was Rebozo's impression that Lewis had come into possession of these stocks just before coming to the bank for the loan. He stated that Lewis told him he obtained the stock from some man in New York, and that Lewis even mentioned the name but it meant nothing to him and he does not recall the name of this individual. He states that Lewis told him that he traded some airline stock to this man for the IBM stock. He did not have the name of the airline, but stated that he did not think that it was a commercial line but perhaps a charter line. It seems that Mr. Lewis is involved in three corporations; one is the airline whose stock was allegedly traded for the IBM Stock, Micron Corporation of New York and one other corporation whose name he does not know. Rebozo said that Lewis did not live in Miami but lived in Atlanta and New York. It seems that Lewis has offices in Atlanta, New York and someplace in California. Rebozo said that the stock was in the name of E. F. Hutton and Company—Street Form, and

he felt that something may be wrong, so he called IBM to determine the ownership of these certificates. He said he suspected that they were counterfeit and sent one of the shares to the IBM Office here, but they stated it appeared genuine. The nine certificates were then presented to IBM and they were reissued in the name of Lewis. Rebozo said that Lewis had recently sold this stock and has paid off the loan.

Deft Key Biscayne Bank's Ex #1 for ID (3pgs) (Riley Depo) 10/11/71 (handwritten at bottom of p. 1 of exhibit)

Mr. Joe Hessler
October 23, 1968
Page 2

It should be pointed out that I do not believe Mr. Rebozo was giving me all the information available to him, and he would not go get his file. Initially, in the interview he refused to give me any information, stating that he had talked to Mr. Clink Scales of the FBI, giving him all of the information about ten days ago. This would appear to me to be a shady deal, and I suspect that Mr. Rebozo is aware of this and did not want to become involved, which accounts for his reluctancy in his discussion with me. He did not talk freely, and the information that was obtained was difficult to extract.

I had one of my men contact the FBI, Clink Scales, on October 15, and he reported that Clink Scales, while cooperative, did not give him any information other than the information contained in the attached

memorandum. Apparently I was in error in saying that Clink Scales did not contact the bank, because in re-reading the memorandum from the adjuster I note that he did say that he contacted the bank.

If we can be of further assistance to you, please advise.

/s/ George H. Riley, Jr.
GEORGE H. RILEY, JR.
CLAIMS MANAGER

GHR:dm

encl.

Oct. 6, 1973

TO: Harry Rosenfeld

FROM: Ron Kessler

RE: Rebozo stock story

I'd like to review with you and our lawyers one issue in the Rebozo story. The issue was raised by Rebozo's lawyer in a recent telephone call and letter prompted by my request for comment. He claimed that the $91,500 in stolen IBM stock was cashed not by Rebozo but by "the bank."

If this were true, our lead would have to say that Rebozo's bank cashed the stock after Rebozo was told it was stolen, rather than that Rebozo cashed it after he was told it was stolen.

I believe we are on safe grounds in saying in the lead that Rebozo cashed the stock, and spelling out later in the story the support for that statement and Rebozo's lawyer's denial. First, some preliminary points.

1. We know for a fact that Rebozo personally handled the entire loan transaction from its inception up until the second batch of the stock—the $91,500—was cashed.

2. We know for a fact that the insurance investigator working on the stolen stock case met personally with Rebozo, and we know that he swore under oath that he told Rebozo the stock was stolen.

3. We know for a fact that on the same day of this meeting, Rebozo personally wrote a letter suggesting to Lewis, the borrower, that Rebozo sell the stock for him.

4. We know for a fact that about a month elapsed between the time Rebozo was told the stock was stolen and the time the proceeds of the stolen stock were disbursed to Lewis through a checking account held by Lewis at Rebozo's bank. Regardless of whether Rebozo personally ordered the stock cashed, Rebozo during this time period had a legal obligation, having been told the stock was stolen, to stop the sale and prevent Lewis from getting the money. Prosecutors with whom I've talked say that by not doing so, Rebozo for this reason alone was committing a crime.

So who cashed the stock? Neither Rebozo nor other witnesses were asked this question in the depositions. There are no other legal papers in the court file to answer the question.

But there are copies of the bills, receipts, and checks covering the sale transaction. As is clear from the attached, they all bear Rebozo's name.

I don't think this can be shown to be a technicality. Normally these transactions would be handled by the trust or loan departments of a bank, and would bear the name of the department or officer handling them. The fact that Rebozo's name appears on them, and that the transactions were executed on his personal account, appear to me to be more than sufficient evidence for the purposes of an accurate and fair newspaper account of what appears in the court file that Rebozo technically and substantively cashed the stock.

Oct. 7, 1973

TO: Harry Rosenfeld

FROM: Ron Kessler

RE: Rebozo letter

Attached is the letter from Rebozo's lawyer. It is a lot of crap, as the facts in the case reported in our story make clear.

Two statements deserve comment. The first is the contention that the joint pre-trial stipulation to which I referred is not in existence.

The claim is contradicted by both the official court file and official court docket, both of which list the document in question as the joint pre-trial stipulation, not a proposed stipulation or one agreed to by only one of the parties, as shown on the attached.

This is further confirmed by clerks of the court, who looked up the docket in question and said that the document only would have been filed the way it is if it were the official joint stipulation in the case and had been agreed to by all parties. The clerks said such documents are checked by several lawyers of [sic] clerks before they are entered as they are in the file and on the docket.

If the document in question was not agreed to by all the parties, it was incorrectly labeled by the lawyers and improperly filed and docketed by the court. Our reporting of the official records of the case was 100%

accurate, and the fact remains that from the standpoint of the official record, the document in question is the joint pre-trial stipulation.

The other point is the statement that the judge in the case found Rebozo and the bank had acted properly. As the lawyer himself argued in the trial, Rebozo's actions in cashing the stock had nothing to do with the case. The case revolved around a narrow legal issue that only pertained to actions that took place during two days of a long sequence of events.

The judge's ruling on those two days' events has been appealed and the case was remanded back to the judge for a more explicit, written ruling.

I have recently found that the judge, Lawrence King, was a director of Miami National Bank when it was under Teamster control and had a Teamster mortgage. His fellow directors included several associates of Hoffa and Meyer Lansky. Asked about this, the judge said he was not aware of the Teamster involvement, and if he had been, he would have resigned.

Petitioner's Reply Brief

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No. 81-173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE WASHINGTON POST COMPANY,
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v.

CHARLES G. REBOZO,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, The Washington Post Company, submits this Reply Brief to correct two mischaracterizations of the record by the respondent in his Brief in Opposition.

1. Recognizing the force of the Post's contention that the reporting of sworn testimony of a professional insurance investigator is protected under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny, Rebozo argues in his Brief in Opposition that the Post did not accurately report the investigator's testimony. Rebozo stubbornly insists that he has "never conceded" in this proceeding "that the investigator, Mr. Riley, testified that he told Mr. Rebozo that the stock in question was stolen." Brief in Opposition, at 2. In fact, Mr. Rebozo made that precise concession at a time and under circumstances that make it impossible for him now to disavow it. In his pre-publication letter listing his objections to the Post's proposed story, Rebozo's counsel—the same counsel representing him in this case—stated:

> "Mr. Riley in his deposition does make the allegation that he told the Bank and Mr. Rebozo . . . that the stock was stolen." [1]

Having confirmed to the Post, before publication, the accuracy of its account of Riley's testimony, Rebozo is hardly in a position to argue to this Court, as he has done, that the manner in which the Post "characterized" Riley's testimony is evidence of actual malice.

2. In attempting to argue that the Post acted with actual malice in reporting Riley's sworn testimony that he told Rebozo the stock was stolen, Rebozo states:

> ". . . the employer of Mr. Riley and its insured E. F. Hutton did not know, at the time of Mr. Riley's visit to Mr. Rebozo [October 22, 1968], that the stock was stolen. They only knew that the stock was short or missing. They did not determine the fact of actual theft until December 5, 1968 . . . ." Brief in Opposition, at 20-21. *See also id.* at 23.

There is no basis in the record of this case, or in the record of the underlying conversion case, for such a statement. In fact, Thomas P. Lynch, senior vice president of E. F. Hutton, testified in his deposition in the conversion case as follows:

> "A. . . . law enforcement agencies were brought in in mid to late August when it became obvious that there had been a theft.
>
> Q. When did E. F. Hutton & Company first determine that there had been a theft?
>
> A. Late August or early September. I am not certain of the date." [2]

At trial Mr. Lynch gave further testimony on the point.

> "Q. Would you please tell the Court how you first became aware that there may have been some theft of E. F. Hutton stocks of the IBM nature?

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[1] Appendix to the Petition for a Writ of Certiorari, at 43a.

[2] *Fidelity and Casualty Co.* v. *Key Biscayne Bank*, No. 70-619-Civ (S.D. Fla.), Deposition of Plaintiff E. F. Hutton, by and through Thomas P. Lynch, at 10-11, quoted in this case at R. 731.

> A. First indication that there was a theft was when I was called on the phone on September 13th by an outsider . . . .[3]

Rebozo does not cite a single shred of evidence to the effect that E. F. Hutton did not know until December that there had been a theft, and in fact there is none. Rebozo purports to rely upon an opinion of the court of appeals in the underlying conversion case, but that opinion did not suggest that E. F. Hutton did not know until December that there had been a theft.[4] It did observe that it was not until December that E. F. Hutton knew that the 900 shares at issue here were among the 5,000 missing shares. But that observation casts no doubt upon the accuracy of Riley's testimony for several reasons, stated more fully in footnote 7 of the Petition for a Writ of Certiorari—(1) the observation was contained in an opinion that was issued a year after the Post article was published, (2) the observation was irrelevant to the issue in the case, and (3) it was based on a record that excluded important evidence that would have demonstrated the inaccuracy of the observation (most notably Riley's deposition).

It is inconceivable that if the issue had been of importance and the court of appeals had been presented with all of the testimony, including Riley's, it would have stated that E. F. Hutton did not know at the time of Riley's visit that the 900 shares at issue were among those missing from E. F. Hutton's vaults. Certainly, if Rebozo intends to argue in this case that Riley did not know at the time of his visit that the 900 shares were

---

[3] *Fidelity and Casualty Co.* v. *Key Biscayne Bank*, *supra*, Trial Transcript, January 24, 1972 [hereafter "Tr."] at 62, quoted in this case at R. 731. It was at this point that Lynch "contacted the F.B.I., our insurance carrier, New York City Police." *Id.* at 63-64, quoted at R. 732.

[4] In fact, the court of appeals recognized that "Hutton became aware of the possible theft of the stock certificates on September 13, 1968." *Fidelity and Casualty Co.* v. *Key Biscayne Bank*, 501 F.2d 1322, 1323 (5th Cir. 1974).

among the stolen ones, it is incumbent upon him to cite some evidence to that effect other than a statement a year after the Post story by a court that was unaware that Riley's visit even took place. In fact, the evidence in the underlying conversion case fully supports the rather obvious point that E. F. Hutton, having sent Riley to the Key Biscayne Bank to inquire about nine specific stock certificates, had established that the certificates were among the stolen ones.[5]

---

[5] Lynch, E. F. Hutton's senior vice president, testified as follows:

"Q. How did you happen to become aware of the 900 shares as being lost, stolen, or misplaced securities, that are the subject of this lawsuit?

A. We became aware of the 900 shares when I received a phone call from the F.B.I. agent working on the case . . . .

Q. What was the approximate date that you learned about the 900 shares?

A. It was early in October.

Tr. 66-67, quoted at R. 732. See also R. at 731.

James M. Condon of Fidelity and Casualty (E. F. Hutton's insurance carrier) testified:

"Q. When was your company first notified that E. F. Hutton & Co. was unable to account for these stock certificates?

A. Sometime during the week of Oct. 9th, 10th, or 11th.

. . .

Q. Did the Fidelity and Casualty Company of New York . . . inform The Key Biscayne Bank . . . that the stock here in question in this lawsuit was the property of E. F. Hutton & Co.?

A. That was the . . . purpose of Mr. Reilly's [sic] visit to the bank at that time in October of 1968."

Fidelity and Casualty Co. v. *Key Biscayne Bank*, Deposition of James M. Condon, at 4, 19, quoted at R. 732-33.

Riley, in turn, testified that he was contacted in "mid-October, 1968" and "asked to determine if stock which had been stolen from our insured's vault was pledged as collateral for a loan at the Key Biscayne Bank." *Id.*, Deposition of George H. Riley, at 5, quoted at R. 733. Riley's testimony is reprinted in full in the Appendix to the Petition for Certiorari, at 58a-67a.

If the groundless contentions of the plaintiff here were sufficient to raise a genuine issue of actual malice with respect to the accurate reporting of sworn testimony, then the protection of the actual malice standard would be slim indeed. This Court has described the actual malice standard as one of subjective "good faith." *St. Amant* v. *Thompson*, 390 U.S. 727, 731-33 (1968). And in a related context, it has emphasized that the question of subjective good faith raised by the defense of qualified official immunity may be resolved on a properly supported motion for summary judgment. *Butz* v. *Economou*, 438 U.S. 478, 507-08 (1978); *Scheuer* v. *Rhodes*, 416 U.S. 232, 250 (1974). "In responding to such a motion", the Court cautioned, "plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz* v. *Economou*, 438 U.S. at 508. It is time, petitioner submits, for this Court to issue a similar warning that unsupported claims of actual malice will not withstand summary judgment.

Respectfully submitted,

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